

10-25-2007

Stoddard v. Hagadone Corp. Clerk's Record v. 1 Dckt. 34335

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LAW CLERK

Vol. 1 of 3

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

ROBERT J. STODDARD,

Claimant,

v.

THE HAGADONE CORPORATION,
Employer, and ROYAL INDEMNITY
COMPANY, Surety,

Defendants/Appellants/Cross-
Respondents,

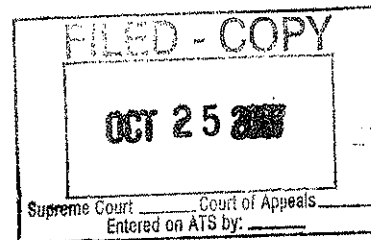
and

STATE OF IDAHO, INDUSTRIAL
SPECIAL INDEMNITY FUND,

Defendant/Respondent/Cross-
Appellant.

SUPREME COURT NO. 34335

AGENCY'S RECORD



Attorney for Defendants/Appellants/Cross-Respondents

ERIC S. BAILEY
PO BOX 1007
BOISE, ID 83701

Attorney for Defendant/Respondent/Cross-Appellant

KENNETH L. MALLEA
PO BOX 857
MERIDIAN, ID 83680

34335

COPY

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LIST OF EXHIBITS

Reporter's Transcript taken on March 14, 2001, will be lodged with the Supreme Court.
Reporter's Transcript taken on July 19, 2006, will be lodged with the Supreme Court.

Claimant's Exhibits from 3/14/01 Hearing:

1. Medical records of William H. Shanks, M.D.
2. Medical records of Robert S. West, M.D.
3. Medical records of H. Graeme French, M.D.
4. Records of North Idaho Physical Therapy
5. Medical records of Wilbur H. Lyon, M.D.
6. Medical records of John L. Pennings, M.D.
7. Medical records of William H. Hall, M.D.
8. Medical records of Richard K. Bell, M.D.
9. Medical records of Thomas K. Thilo, M.D.
10. Records of Lake City Physical Therapy
11. Medical records of VA Medical Center
12. Report of Paula Taylor, P.T., Senior Physical Therapist Kootenai Medical Center
13. Records of Dan Brownell, Industrial Commission Rehabilitation Division
14. Excerpts from Claimant's personnel file with Employer
15. Records of James Y. Lea, M.D.
16. Notice of Injury, dated 5/23/96
17. Notice of Injury, dated 11/5/97
18. Workers' Compensation Loss notice dated 5/17/99
19. Correspondence with Gates McDonald from 8/2/99 through 10/28/99
20. Letter dated 1/14/00 from John T. Mitchell to Gates McDonald with enclosures
21. 5/21/99 written statement of Claimant to adjuster for 5/11/99 injury
22. Transcription of 5/27/99 telephone statement of Claimant to adjuster Judy Harris
23. Benefits Summary from Gates McDonald for 5/11/99 injury
24. Benefit Summary for 5/9/96 and 10/10/96 injuries
25. 1996 – 1998 tax returns of Claimant
26. Deposition transcript of Ivar W. Birkeland, M.D.
27. Resume of Robert Stoddard

Defendants' Exhibits from 3/14/01 Hearing

- A. 11/11/99 report of Warren J. Adams, M.D.
- B. 11/9/99 report of Ivar W. Birkeland, M.D.
- C. 2/2/01 report of Stephen R. Sears, M.D.

- D. Deposition transcript of Robert Stoddard in Stoddard v. Preece, Case No. CV98-04057
- E. Arbitration Award in Stoddard v. Hartford Insurance Company, Case No. CV99-03044
- F. Deposition transcript of Dan Brownell
- G. Deposition transcript of Robert Stoddard, dated 12/17/99

Defendant Employer/Surety Exhibits from 7/19/06 Hearing:

- 1. Accident report forms
- 2. Records of John Pennings, MD
- 3. Records of William Lyons, MD
- 4. Records of the Veterans Administration
- 5. Records of Graeme French, MD
- 6. Records of Robert West, MD
- 7. Records of Williams Shanks, MD
- 8. IME report of Warren Adams, MD
- 9. Functional Capacity Evaluation
- 10. Records of North Idaho Physical Therapy
- 11. Records of Lake City Orthopaedic & Sports Physical Therapy
- 12. Case notes of Dan Brownell, ICRD

Defendant ISIF's Exhibits from 7/19/06 Hearing:

- 1. Notice of Hearing, dated July 24, 2000
- 2. Findings of Fact, Conclusions of Law, and Recommendation, filed September 7, 2001
- 3. Order, filed September 7, 2001
- 4. Defendants Hagadone and Royal Indemnity's Response to Claimant's Motion for Payment Under Idaho Code Section 72-313, Alternative Motion for Clarification (Reconsideration) Pursuant to Idaho Code Section 72-718, dated September 27, 2001
- 5. Defendants Hagadone and Royal Indemnity's Memorandum in Support of Motion for Recommendation, dated September 27, 2001
- 6. Order Regarding Reconsideration, filed December 14, 2001.

Additional Documents:

- 1. Notice of Hearing, dated 7/24/00
- 2. Petition for Declaratory Ruling, filed 10/11/02
- 3. Memorandum in Support of Petition for Declaratory Ruling, filed 10/12/02
- 4. Defendants Employer/Surety's Memorandum in Opposition to Petition for Declaratory Ruling, filed 10/30/02
- 5. Memorandum in Response to Employer/Surety's Memorandum in Opposition to Petition for Declaratory Ruling, filed 11/8/02
- 6. Claimant's Position with Respect to Proceedings, filed 11/8/02
- 7. Declaratory Ruling (IC 15-000063), filed 8/27/03

8. Deposition of Dan Brownell, taken 9/21/06
9. Deposition of Tiffany Jaegen-NyStull, taken 9/21/06
10. Deposition of Doug Crum, dated 10/20/06
11. Defendant ISIF's Post Hearing Brief, filed 3/7/07

WORKERS COMPENSATION COMPLAINT

CLAIMANT'S NAME AND ADDRESS Robert Stoddard 880 E. Pearl Hayden Lake, ID 83835		CLAIMANT'S ATTORNEY'S NAME AND ADDRESS John T. Mitchell 408 E. Sherman Ave., Suite 316 Coeur d'Alene, ID 83814	
EMPLOYER'S NAME AND ADDRESS Hagadone Corporation P. O. Box 6200 Coeur d'Alene, ID 83816		WORKER'S COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS General Insurance Company of America 670 E. River Park Lane, Suite 400 Boise, ID 83706	
CLAIMANT'S SSN 518-34-2182	CLAIMANT'S BIRTHDATE 03/16/36	DATE OF INJURY OR MANIFESTATION OF OCCUPATIONAL DISEASE May 5, 1996	
STATE AND COUNTY IN WHICH INJURY OCCURRED Kootenai County, Idaho		WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE WEEKLY WAGE OF: Approximately \$420.00/wk approx. \$10.50/hour	
DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED) Accident happened as claimant was taking flat of geraniums off boat onto dock, one foot on the dock one foot on boat and boat moved, felt a tearing sensation in left groin.			
NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE Hernia with two surgeries, residuals from the injury and the two surgeries.			
WHAT WORKER'S COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME? Extent of medical impairment, extent of disability in excess of medical impairment.			
DATE ON WHICH NOTICE OF INJURY WAS GIVEN TO EMPLOYER Approximately May 5, 1996		TO WHOM DID YOU GIVE NOTICE Probably Berni Dami, Mr. Hagadone's personal secretary	
HOW WAS NOTICE GIVEN: <input checked="" type="checkbox"/> ORAL <input checked="" type="checkbox"/> WRITTEN <input type="checkbox"/> OTHER, PLEASE SPECIFY			
ISSUE OR ISSUES INVOLVED Extent of medical impairment and extent of disability in excess of medical impairment. Need for future care and medical treatment. Attorney fees for the unreasonable denial/delay of medical treatment.			
DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO IF SO PLEASE STATE WHY. No.			

NOTICE: COMPLAINTS AGAINST THE INDUSTRIAL SPECIAL INDEMNITY FUND MUST BE FILED ON FORM I.C. 1002

PHYSICIANS WHO TREATED CLAIMANT (NAME AND ADDRESS)

Robert S. West, M.D.
920 Ironwood Dr.
Coeur d'Alene, ID 83814

William H. Hall, M.D.
2177 Ironwood Center Dr.
Coeur d'Alene, ID 83814

John L. Pennings
Wilbur H. Lyon, M.D.
1607 Lincoln Way Suite 100
Coeur d'Alene, ID 83814

Richard Bell, M.D.
914 Ironwood Dr.
Coeur d'Alene, ID 83814

Tom Thilo, M.D.
700 Ironwood Dr. Suite 304
Coeur d'Alene, ID 83814

WHAT MEDICAL COSTS HAVE YOU INCURRED TO DATE? Unknown

WHAT MEDICAL COSTS HAS YOUR EMPLOYER PAID, IF ANY \$ Unknown, WHAT MEDICAL COSTS HAVE YOU PAID \$ Unknown
I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE X YES NO
DATE SIGNATURE OF CLAIMANT OR ATTORNEY

PLEASE ANSWER THE SET OF QUESTIONS IMMEDIATELY BELOW

ONLY IF CLAIM IS MADE FOR DEATH BENEFITS

NAME OF DECEASED	DATE OF DEATH	RELATION OF DECEASED TO CLAIMANT
WAS CLAIMANT DEPENDANT ON DECEASED		
<u> </u> YES <u> </u> NO		
<u> </u> YES <u> </u> NO	DID CLAIMANT LIVE WITH DECEASED AT THE TIME OF THE ACCIDENT	

CLAIMANT MUST COMPLETE, SIGN AND DATE THE FOLLOWING:

MEDICAL RELEASE FORM

I hereby authorize any defendant and defendant's legal counsel, at their sole expense, to examine, inspect, receive or take copies of any medical reports, records, x-rays or test results of hospitals, physicians or any other person, or to receive information from any person having examined me and their diagnosis, relative to my past, present and future physical and mental condition.

I also authorize and direct that a duplicate set of all documents or written records provided to said law firm, or any individual member thereof be also provided to my attorney John T. Mitchell, 408 E. Sherman Ave., Suite 316, Coeur d'Alene, ID 83814. The defendant requesting my records shall bear the expense incurred in production of such duplicate set.

I further authorize that copies of this authorization may be used in lieu of the original. THIS AUTHORIZATION IS VALID ONLY FOR THE DURATION OF THE PENDING LITIGATION. It is further understood that all information obtained under this authorization shall be regarded as confidential and maintained as such.

Dated this 11th day of February, 1999.

Robert J. Stoddard
Claimant's Signature

NOTICE! An Employer or Insurance Company served with a Complaint must file an Answer on Form I.C. 1003 with the Industrial Commission with 21 days of the date of service as specified on the certificate of mailing to avoid default. If no answer is filed, a Default Award may be entered!

Further information may be obtained from: Industrial Commission, Judicial Division, 317 Main Street, Boise, Idaho 83720-6000 (208)334-6000

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of February, 1999, that a true and correct copy of the foregoing was mailed by regular, postage pre-paid, addressed to:

Hagadone Corporation
P. O. Box 6200
Coeur d'Alene, ID 83816

General Insurance Company of America
670 E. River Park Lane, Suite 400
Boise, ID 83706


John T. Mitchell,
Attorney for Claimant

WORKERS COMPENSATION COMPLAINT

<p>CLAIMANT'S NAME AND ADDRESS Robert Stoddard 880 E. Pearl Hayden Lake, ID 83835</p>	<p>CLAIMANT'S ATTORNEY'S NAME AND ADDRESS John T. Mitchell 408 E. Sherman Ave., Suite 316 Coeur d'Alene, ID 83814</p>
<p>EMPLOYER'S NAME AND ADDRESS Hagadone Corporation P.O. Box 6200 Coeur d'Alene, ID 83816</p>	<p>WORKER'S COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS General Insurance Company of America 670 E. River Park Lane, Suite 400 Boise, ID 83706</p>
<p>CLAIMANT'S SSN [REDACTED]</p>	<p>CLAIMANT'S BIRTHDATE [REDACTED]</p>
<p>DATE OF INJURY OR MANIFESTATION OF OCCUPATIONAL DISEASE October 10, 1997</p>	
<p>STATE AND COUNTY IN WHICH INJURY OCCURRED Kootenai County, Idaho</p>	<p>WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE WEEKLY WAGE OF: Approximately \$440.00/wk. \$11.00/hour</p>

DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED) Bent over and grabbed a flower pot which weighed about 150-200 pounds to drag it through a doorway (wouldn't fit through doorway with handtruck), had to pull and tilt

NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE Degenerative disc disease rendered symptomatic from the industrial injury.

WHAT WORKER'S COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME? Extent of medical impairment, extent of disability in excess of medical impairment.

<p>DATE ON WHICH NOTICE OF INJURY WAS GIVEN TO EMPLOYER Approximately October 10, 1997</p>	<p>TO WHOM DID YOU GIVE NOTICE Probably Berni Dami, Mr. Hagadone's personal secretary</p>
<p>HOW WAS NOTICE GIVEN: <input checked="" type="checkbox"/> ORAL <input checked="" type="checkbox"/> WRITTEN <input type="checkbox"/> OTHER, PLEASE SPECIFY</p>	

ISSUE OR ISSUES INVOLVED Extent of medical impairment and extent of disability in excess of medical impairment. Need for future care and medical treatment. Attorney fees for the unreasonable denial/delay of medical treatment.

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? ☐ YES ☒ NO IF SO PLEASE STATE WHY.

PHYSICIANS WHO TREATED CLAIMANT (NAME AND ADDRESS)

Robert S. West, M.D.
920 Ironwood Dr.
Coeur d'Alene, ID 83814

Richard P. Treloar, M.D.
1414 N. Houk, Suite 102
Spokane, WA 99216

Graeme French, M.D.
1200 W. Fairview Ave.
Colfax, WA 99111

WHAT MEDICAL COSTS HAVE YOU INCURRED TO DATE? As far as claimant knows, they have been paid by General Ins. Co. of America. Claimant takes ibuprofen which he has been paying for by himself.

WHAT MEDICAL COSTS HAS YOUR EMPLOYER PAID, IF ANY \$ unknown, WHAT MEDICAL COSTS HAVE YOU PAID \$ unknown

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE ☒ YES ☐ NO
DATE February 11, 1999 SIGNATURE OF CLAIMANT OR ATTORNEY

PLEASE ANSWER THE SET OF QUESTIONS IMMEDIATELY BELOW

ONLY IF CLAIM IS MADE FOR DEATH BENEFITS

NAME OF DECEASED	DATE OF DEATH	RELATION OF DECEASED TO CLAIMANT
WAS CLAIMANT DEPENDANT ON DECEASED		
<input type="checkbox"/> YES <input type="checkbox"/> NO		
	DID CLAIMANT LIVE WITH DECEASED AT THE TIME OF THE ACCIDENT	
<input type="checkbox"/> YES <input type="checkbox"/> NO		

CLAIMANT MUST COMPLETE, SIGN AND DATE THE FOLLOWING:

MEDICAL RELEASE FORM

I hereby authorize any defendant and defendant's legal counsel, at their sole expense, to examine, inspect, receive or take copies of any medical reports, records, x-rays or test results of hospitals, physicians or any other person, or to receive information from any person having examined me and their diagnosis, relative to my past, present and future physical and mental condition.

I also authorize and direct that a duplicate set of all documents or written records provided to said law firm, or any individual member thereof be also provided to my attorney John T. Mitchell, 408 E. Sherman Ave., Suite 316, Coeur d'Alene, ID 83814. The defendant requesting my records shall bear the expense incurred in production of such duplicate set.

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Dated this 11th day of February, 1999.


Claimant's Signature

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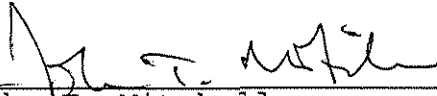
Further information may be obtained from: Industrial Commission, Judicial Division, 317 Main Street, Boise, Idaho 83720-6000 (208)334-6000

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of February, 1999, that a true and correct copy of the foregoing was mailed by regular, postage pre-paid, addressed to:

Hagadone Corporation
P. O. Box 6200
Coeur d'Alene, ID 83816

General Insurance Company of America
670 E. River Park Lane, Suite 400
Boise, ID 83706



John T. Mitchell
Attorney for Claimant

ANSWER TO COMPLAINT

I.C. NO. 97-036904

INJURY DATE October 10, 1997

CLAIMANT'S NAME AND ADDRESS Robert Stoddard 880 E. Pearl Hayden Lake, ID 83835	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS John T. Mitchell 408 E. Sherman Avenue, Suite 316 Coeur d'Alene, ID 83814
EMPLOYER'S NAME AND ADDRESS Hagadone Corporation P. O. Box 6200 Coeur d'Alene, ID 83816	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS General Insurance Company of America 2323 S. Vista Avenue, Suite 101 Boise, ID 83705-4150
ATTORNEY REPRESENTING EMPLOYER OR EMPLOYER/SURETY (NAME AND ADDRESS) Bentley G. Stromberg Clements, Brown & McNichols, P.A. P. O. Box 1510 Lewiston, ID 83501	ATTORNEY REPRESENTING INDUSTRIAL SPECIAL INDEMNITY FUND (NAME AND ADDRESS)

- ☒ The above-named employer or employer/surety responds to Claimant's Complaint by stating:
- ☐ The Industrial Special Indemnity Fund responds to the Complaint against the ISIF by stating:

IT IS: (Check One)	
Admitted	Denied
X	
X	
X	
X	
N/A	
X	
N/A	
X	
X	

1. That the accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed.
2. That the employer/employee relationship existed.
3. That the parties were subject to the provisions of the Idaho Workers' Compensation Act.
4. That the condition for which benefits are claimed was caused partly ☒ entirely ☐ by an accident arising out of and in the course of Claimant's employment.
5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment.
6. That notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.
7. That, if an occupational disease is alleged, notice of such was given to the employer within five months after the employment had ceased in which it is claimed the disease was contracted.
8. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, Section 72-419: \$ _____.
9. That the alleged employer was insured or permissibly self-insured under the Idaho Workers' Compensation Act.

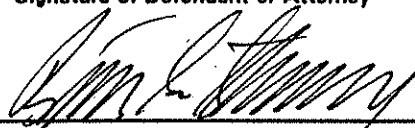
10. What benefits, if any, do you concede are due Claimant?

None.

(Continued from front)

11. State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.
See attached.

Under the Commission rules, you have twenty-one (21) days from the date of service of the Complaint to answer the Complaint. A copy of your Answer must be mailed to the Commission and a copy must be served on all parties or their attorneys by regular U.S. mail or by personal service of process. Unless you deny liability, you should pay immediately the compensation required by law, and not cause the claimant, as well as yourself, the expense of a hearing. All compensation which is concededly due and accrued should be paid. Payments due should not be withheld because a Complaint has been filed. Rule III(D), Judicial Rules of Practice and Procedure under the Idaho Workers' Compensation Law, applies. Complaints against the Industrial Special Indemnity Fund must be filed on Form I.C. 1002.

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE.			<input checked="" type="checkbox"/> YES	<input type="checkbox"/> NO
DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? IF SO, PLEASE STATE.				
No.				
Amount of Compensation Paid to Date			Dated	Signature of Defendant or Attorney
PPD	TTD	Medical		
-0-	-0-	\$4,491.32	3/4/99	

PLEASE COMPLETE

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March, 1999, I caused to be served a true and correct copy of the foregoing Answer upon:

CLAIMANT'S NAME AND ADDRESS

Robert Stoddard
c/o John T. Mitchell

408 E. Sherman Avenue, Suite 316

Coeur d'Alene, ID 83814

EMPLOYER AND SURETY'S
NAME AND ADDRESS

INDUSTRIAL SPECIAL INDEMNITY FUND
(if applicable)

via: ☐ personal service of process
☒ regular U.S. Mail

via: ☐ personal service of process
☐ regular U.S. Mail

via: ☐ personal service of process
☐ regular U.S. Mail


Signature

11. A. Defendants are aware of no unpaid medical bills.

B. Claimant was released to return to work with no limitations and no impairment rating related to this injury. Defendants have paid all benefits due.

C. Defendants may be entitled to apportionment under Idaho Code § 72-406.

D. Defendants reserve the right to raise other defenses following further investigation and discovery.

ANSWER TO COMPLAINT

I.C. NO. 96-018310

INJURY DATE May 5, 1996

CLAIMANT'S NAME AND ADDRESS Robert Stoddard 880 E. Pearl Hayden Lake, ID 83835	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS John T. Mitchell 408 E. Sherman Ave., Suite 316 Coeur d'Alene, ID 83814
EMPLOYER'S NAME AND ADDRESS Hagadone Corporation P. O. Box 6200 Coeur d'Alene, ID 83816	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS General Insurance Company of America 2323 S. Vista Avenue, Suite 101 Boise, ID 83705-4150
ATTORNEY REPRESENTING EMPLOYER OR EMPLOYER/SURETY (NAME AND ADDRESS) Bentley G. Stromberg Clements, Brown & McNichols, P.A. P. O. Box 1510 Lewiston, ID 83501	ATTORNEY REPRESENTING INDUSTRIAL SPECIAL INDEMNITY FUND (NAME AND ADDRESS) _____

☒ The above-named employer or employer/surety responds to Claimant's Complaint by stating:

☐ The Industrial Special Indemnity Fund responds to the Complaint against the ISIF by stating:

IT IS: (Check One)	
Admitted	Denied
X	X
X	
X	
X	
N/A	
X	
N/A	
X	
X	

1. That the accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed.
2. That the employer/employee relationship existed.
3. That the parties were subject to the provisions of the Idaho Workers' Compensation Act.
4. That the condition for which benefits are claimed was caused partly ☐ entirely ☐ by an accident arising out of and in the course of Claimant's employment.
5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment.
6. That notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.
7. That, if an occupational disease is alleged, notice of such was given to the employer within five months after the employment had ceased in which it is claimed the disease was contracted.
8. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, Section 72-419: \$ _____.
9. That the alleged employer was insured or permissibly self-insured under the Idaho Workers' Compensation Act.

10. What benefits, if any, do you concede are due Claimant?

None.

(Continued from front)

11. State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.

See attached.

Under the Commission rules, you have twenty-one (21) days from the date of service of the Complaint to answer the Complaint. A copy of your Answer must be mailed to the Commission and a copy must be served on all parties or their attorneys by regular U.S. mail or by personal service of process. Unless you deny liability, you should pay immediately the compensation required by law, and not cause the claimant, as well as yourself, the expense of a hearing. All compensation which is concededly due and accrued should be paid. Payments due should not be withheld because a Complaint has been filed. Rule III(D), Judicial Rules of Practice and Procedure under the Idaho Workers' Compensation Law, applies. Complaints against the Industrial Special Indemnity Fund must be filed on Form I.C. 1002.


I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE.

☒ YES

☐ NO

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? IF SO, PLEASE STATE.

No.

Amount of Compensation Paid to Date			Dated	Signature of Defendant or Attorney
PPD	TTD	Medical		
Will Supplement	Will Supplement	Will Supplement	3/4/99	

PLEASE COMPLETE

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March, 1999, I caused to be served a true and correct copy of the foregoing Answer upon:

CLAIMANT'S NAME AND ADDRESS

EMPLOYER AND SURETY'S
NAME AND ADDRESS

INDUSTRIAL SPECIAL INDEMNITY FUND
(if applicable)

Robert Stoddard
c/o John T. Mitchell

408 E. Sherman Ave., Suite 316

Coeur d'Alene, ID 83814

via: ☐ personal service of process
☒ regular U.S. Mail

via: ☐ personal service of process
☐ regular U.S. Mail

via: ☐ personal service of process
☐ regular U.S. Mail

Signature

11

11.

A. Defendants' records indicate that the accident occurred on May 9, 1996 rather than on May 5, 1996.

B. Defendants are aware of no unpaid medical bills.

C. Claimant was assigned a 10% of the whole person permanent partial impairment rating; claimant was released to return to his pre-injury job; and claimant did return to his pre-injury job. Claimant has not sustained any disability in excess of his impairment rating.

D. Defendants may be entitled to apportionment under Idaho Code § 72-406.

E. Defendants have never denied or delayed approval of medical treatment or of any other benefit. There is no basis for an award of attorney fees.

THOMAS A. MITCHELL
JOHN T. MITCHELL
408 E. Sherman Avenue, Suite 316
Coeur d'Alene, ID 83814
Telephone: 208 664-8111

BEFORE THE INDUSTRIAL COMMISSION, STATE OF IDAHO

ROBERT STODDARD,

Claimant,

v.

HADADONE CORPORATION,

Employer,

and

GENERAL INSURANCE COMPANY
OF AMERICA,

Surety,

I.C. No. 96-018310
No. 97-036904

MOTION AND ORDER TO
CONSOLIDATE CASES

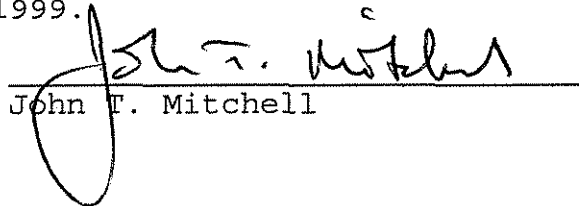
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INDUSTRIAL COMMISSION
JUN 14 P 3:26

Claimant, by and through his attorney, John T. Mitchell, hereby moves the court, pursuant to Rule 42(a) of the Idaho Rules of Civil Procedure, and the Idaho Industrial Commission Rule III B (J.R.P. III B) for an Order consolidating the above entitled cases and for hearing and disposition.

This motion is based upon the grounds that the Complaints were filed in approximately the same time period, all involve the same claimant and defendant/employer/surety, the hearing will

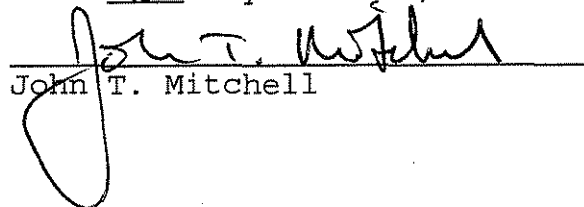
decide the issue of apportionment among the employer, the hearing will involve similar questions of law and fact as regards to the rights and interest of all parties, and the motion is based upon the ground that costs and delay will be reduced, and multiplicity of actions and a possibility of inconsistent judgments will be avoided.

Dated this 10th day of June, 1999.


John T. Mitchell

True copy mailed:
Bentley Stromberg
CLEMENTS, BROWN & McNICHOLS, P.A.
P.O. Box 1510
Lewiston, ID 83501

this 10th day of June, 1999.


John T. Mitchell

ORDER

Based on the foregoing motion and good cause appearing therefore,

IT IS HEREBY ORDERED that the Industrial Commission Case Nos., 97-036904 and 96-018310 will, for purposes of hearing at disposition be consolidated.

Dated this ____ day of June, 1999.

Rachel S. Gilbert, Chairman

True copy mailed to:
Bentley Stromberg
CLEMENTS, BROWN & McNICHOLS, P.A.
P.O. Box 1510
Lewiston, ID 83501

John T. Mitchell
408 E. Sherman Ave., #316
Coeur d'Alene, ID 83814

this ____ day of June, 1999.

By

Bentley G. Stromberg
CLEMENTS, BROWN & McNICHOLS, P.A.
Attorneys at Law
Post Office Box 1510
321 13th Street
Lewiston, ID 83501
(208) 743-6538
(208) 746-0753 Facsimile
ISB #3737

Attorneys for Defendants

1999 JUN 23 A 11:05
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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT STODDARD,)
)
 Claimant,)
)
 vs.)
)
 HAGADONE CORPORATION,)
)
 Employer,)
)
 and)
)
 GENERAL INSURANCE COMPANY)
 OF AMERICA,)
)
 Surety,)
 Defendants.)

I.C. No: 96-018310

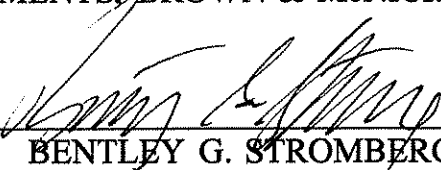
DEFENDANTS' RESPONSE TO
MOTION TO CONSOLIDATE

Defendants have no objection to Claimant's Motion to Consolidate.

DATED this 21st day of June, 1999.

CLEMENTS, BROWN & McNICHOLS, P.A.

By


BENTLEY G. STROMBERG
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of June, 1999, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

John T. Mitchell
Attorney at Law
408 E. Sherman Avenue, Suite 316
Coeur d Alene, ID 83814

☒ U.S. MAIL
☐ HAND DELIVERED
☐ OVERNIGHT MAIL
☐ TELECOPY (FAX)


Bentley G. Stromberg

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT J. STODDARD,

Claimant,

vs.

DUANE HAGADONE, dba
HAGADONE CORPORATION,

Employer,

and

GENERAL INSURANCE COMPANY
OF AMERICAN,

Surety,
Defendants.

IC 96-018310
97-036904

ORDER TO CONSOLIDATE

FILED

JUN 29 1999

INDUSTRIAL COMMISSION

On June 14, 1999, Claimant filed a Motion and Order to Consolidate Cases. Defendants filed a response on June 23, 1999. Based on Claimant's motion and Defendants' response, the Industrial Commission of the State of Idaho hereby **ORDERS** that those claims presently pending before the Industrial Commission known as IC 96-018310 and IC 97-036904 are hereby consolidated into a single proceeding. Future pleadings require reference to the two IC numbers listed above, but only a single document need be filed with the Commission.

DATED in Boise, Idaho, on this 29 day of June, 1999.

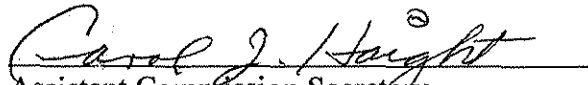
INDUSTRIAL COMMISSION



Michael E. Powers, Referee

ORDER TO CONSOLIDATE - 1

ATTEST:


Assistant Commission Secretary

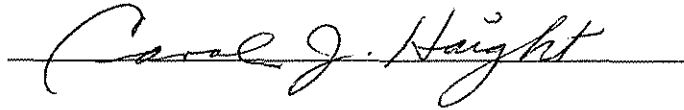
CERTIFICATE OF SERVICE

I hereby certify that on the 29 day of June, 1999, a true and correct copy of **ORDER TO CONSOLIDATE** was served by regular United States mail upon each of the following:

JOHN T MITCHELL ESQ
408 E SHERMAN AVE STE 316
COEUR D'ALENE ID 83814

BENTLEY G STROMBERG ESQ
POST OFFICE BOX 1510
LEWISTON ID 83501-1510

cjh



ORDER TO CONSOLIDATE - 2

WORKERS COMPENSATION COMPLAINT

CLAIMANT'S NAME AND ADDRESS Robert stoddard 880 E. Pearl Hayden, ID 83835		CLAIMANT'S ATTORNEY'S NAME AND ADDRESS John T. Mitchell 408 E. Sherman Ave., Suite 316 Coeur d'Alene, ID 83814
EMPLOYER'S NAME AND ADDRESS The Hagadone Corporation 111 S. 1 st St. Coeur d'Alene, ID 83814		WORKER'S COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS Gates McDonald 3041 Pasadena Drive Boise, ID 83705
CLAIMANT'S SSN [REDACTED]	CLAIMANT'S BIRTHDATE [REDACTED]	DATE OF INJURY OR MANIFESTATION OF OCCUPATIONAL DISEASE 5/11/99
STATE AND COUNTY IN WHICH INJURY OCCURRED Idaho, Kootenai County		WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE WEEKLY WAGE OF: \$480 (\$12/hr x 40/hrs/week)

DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED) Mowing on a steep slope, feet slipped out from under him, fell landed on buttocks very hard and slid down hill tumbled to left. Pain in low back and above right hip, pain in lower left groin, numbness in left leg from hip to knee.

NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE Acute fall aggravated the facet joint arthritis giving him the acute symptoms he has had since the May 11, 1999 fall. Injury superimposed on stenosis, degenerative disc disease and arthritis. Muscle tightness and back pain, groin pain, thigh pain and thigh weakness and numbness in left leg. Symptoms have worsened since insurance carrier discontinued all benefits including medical care, after the insurance panel examination.

WHAT WORKER'S COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME? Payment of medical expenses, and physical therapy expenses ordered by Dr. Shanks, TTD benefits during the period of recovery, PPI and FPD after stability is reached, attorney fees.

DATE ON WHICH NOTICE OF INJURY WAS GIVEN TO EMPLOYER? May 11, and 12, 1999	TO WHOM DID YOU GIVE NOTICE Mentioned symptoms to Mary Rex on 5/11/99, told Berni Dami, Secretary to Mr. Hagadone on 5/12/99.
---	--

HOW WAS NOTICE GIVEN: ☒ ORAL ☐ WRITTEN ☐ OTHER, PLEASE SPECIFY

ISSUE OR ISSUES INVOLVED Attorney fees for the unreasonable denial of payment of medical expenses for a May 25, 1999 CT Scan, for an August 9, 1999 MRI bill, for the discontinuation of all benefits on December 10, 1999 per the insurance panel evaluation of Dr. Warren Adams.

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? ☒ YES ☐ NO IF SO PLEASE STATE WHY.

RECEIVED
INDUSTRIAL COMMISSION
APR 17 10:20

PHYSICIANS WHO TREATED CLAIMANT (NAME AND ADDRESS)

Robert West, M.D.
920 Ironwood Dr. Suite A
Coeur d'Alene, ID 83814

Graeme French, M.D.
1200 W. Fairview
Colfax, WA 99111

William Shanks, M.D.
Northwest Orthopedic & Fracture Clinic
W. 105 Eighth Avenue, Suite 6080
Spokane, WA 99204

John K. Shuster, M.D.
Northwest Orthopedic & Fracture Clinic
W. 105 Eighth Avenue, Suite 6080
Spokane, WA 99204

WHAT MEDICAL COSTS HAVE YOU INCURRED TO DATE? Unknown

WHAT MEDICAL COSTS HAS YOUR EMPLOYER PAID, IF ANY \$ unknown, WHAT MEDICAL COSTS HAVE YOU PAID \$ unknown.

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE ☒ YES ☐ NO

DATE: April 14, 2000

[Signature]
SIGNATURE OF CLAIMANT OR ATTORNEY

PLEASE ANSWER THE SET OF QUESTIONS IMMEDIATELY BELOW
ONLY IF CLAIM IS MADE FOR DEATH BENEFITS

NAME OF DECEASED	DATE OF DEATH	RELATION OF DECEASED TO CLAIMANT
WAS CLAIMANT DEPENDANT ON DECEASED		
<input type="checkbox"/> YES <input type="checkbox"/> NO		
	DID CLAIMANT LIVE WITH DECEASED AT THE TIME OF THE ACCIDENT	
<input type="checkbox"/> YES <input type="checkbox"/> NO		

CLAIMANT MUST COMPLETE, SIGN AND DATE THE FOLLOWING:

MEDICAL RELEASE FORM

I hereby authorize any defendant and defendant's legal counsel, at their sole expense, to examine, inspect, receive or take copies of any medical reports, records, x-rays or test results of hospitals, physicians or any other person, or to receive information from any person having examined me and their diagnosis, relative to my past, present and future physical and mental condition.

I also authorize and direct that a duplicate set of all documents or written records provided to said law firm, or any individual member thereof be also provided to my attorney JOHN T. MITCHELL. The defendant requesting my records shall bear the expense incurred in production of such duplicate set.

I further authorize that copies of this authorization may be used in lieu of the original. THIS AUTHORIZATION IS VALID ONLY FOR THE DURATION OF THE PENDING LITIGATION. It is further understood that all information obtained under this authorization shall be regarded as confidential and maintained as such.

Dated this 14th day of April, 2000.

[Signature]
Claimant's Signature

NOTICE! An Employer or Insurance Company served with a Complaint must file an Answer on Form I.C. 1003 with the Industrial Commission with 21 days of the date of service as specified on the certificate of mailing to avoid default. If no answer is filed, a Default Award may be entered!

Further information may be obtained from: Industrial Commission, Judicial Division, 317 Main Street, Boise, Idaho 83720-6000 (208)334-6000

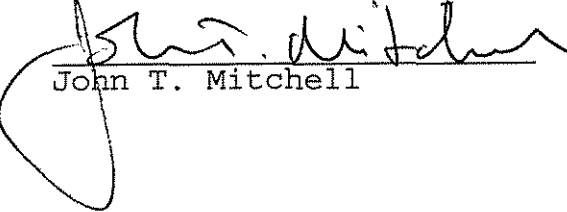
CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of April, 2000, that a true and correct copy of the foregoing was mailed by regular, postage pre-paid, addressed to:

The Hagadone Corporation
111 S. 1st St.
Coeur d'Alene, ID 83814

Gates McDonald
3041 Pasadena Drive
Boise, ID 83705

Courtesy copy to:
Glenna Christensen
P.O. Box 829
Boise, ID 83701


John T. Mitchell

ANSWER TO COMPLAINT
I.C. NO. 99-016897

CLAIMANT'S NAME AND ADDRESS Robert Stoddard 880 E. Pearl Avenue Hayden, ID 83835	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS John T. Mitchell Mitchell Law Firm 408 East Sherman - Suite 316 Coeur d'Alene, ID 83814-2778
EMPLOYER'S NAME AND ADDRESS The Hagadone Corporation 111 South First Street Coeur d'Alene, ID 83816	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS Royal Indemnity Company c/o Gates McDonald PO Box 6390 Boise, ID 83707
ATTORNEY REPRESENTING EMPLOYER OR EMPLOYER/SURETY (NAME AND ADDRESS) Glenna M. Christensen, ISB No. 2333 MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED PO Box 829 Boise, ID 83701	ATTORNEY REPRESENTING INDUSTRIAL SPECIAL INDEMNITY FUND (NAME AND ADDRESS) N/A

The above-named employer or employer/surety responds to Claimant's Complaint by stating:

IT IS: (Check One)		
Admitted	Denied	
<input checked="" type="checkbox"/>		1. That the accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed.
<input checked="" type="checkbox"/>		2. That the employer/employee relationship existed.
<input checked="" type="checkbox"/>		3. That the parties were subject to the provisions of the Idaho Workers' Compensation Act.
	<input checked="" type="checkbox"/>	4. That the condition for which benefits are claimed was caused partly <input checked="" type="checkbox"/> entirely <input type="checkbox"/> by an accident out of and in the course of Claimant's employment.
N/A		5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment.
<input checked="" type="checkbox"/>		6. That notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.
N/A		7. That, if an occupational disease is alleged, notice of such was given to the employer within five months after the employment had ceased in which it is claimed the disease was contracted.
<input checked="" type="checkbox"/>		8. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code Section 72-419: \$
<input checked="" type="checkbox"/>		9. That the alleged employer was insured or permissible self-insured under the Idaho Workers' Compensation Act.

10. What benefits, if any, do you concede are due Claimant?

Those paid to date.

23

(Continued)

11. State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.

I

Whether the claimant's continuing complaints are causally related to the accident of May 11, 1999, or are due to degenerative changes, aging, and/or prior injuries.


II

Whether the claimant is in need of additional medical treatment causally related to the May 11, 1999, accident.

III

Whether claimant has any permanent impairment causally related to the accident of May 11, 1999.

Under the Commission rules, you have twenty-one (21) days from the date of service of the Complaint to answer the Complaint. A copy of your Answer must be mailed to the Commission and a copy must be served on all parties or their attorneys by regular U.S. mail or by personal service of process. Unless you deny liability, you should pay immediately the compensation required by law, and not cause the claimant, as well as yourself, the expense of a hearing. All compensation which is concededly due and accrued should be paid. Payments due should not be withheld because a Complaint has been filed. Rule III(D), Judicial Rules of Practice and Procedure under the Idaho Workers' Compensation Law, applies. Complaints against the Industrial Special Indemnity Fund must be filed on Form I.C. 1002.

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. <input type="checkbox"/> YES <input type="checkbox"/> NO <input checked="" type="checkbox"/> POSSIBLY				
DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? IF SO, PLEASE STATE.				
No.				
Amount of Compensation Paid to Date			Dated May 3, 2000	Signature of Defendant or Attorney  Glenna M. Christensen
PPD	TTD	Medical		
\$-0-	\$9,647.84	\$9,202.02		

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of May, 2000, I caused to be served a true and correct copy of the foregoing Answer upon:

**CLAIMANT'S ATTORNEY'S
NAME AND ADDRESS**

John T. Mitchell
Mitchell Law Firm
408 East Sherman - Suite 316
Coeur d'Alene, ID 83814-2778

**EMPLOYER AND SURETY'S
NAME AND ADDRESS**

**INDUSTRIAL SPECIAL
INDEMNITY FUND (if applicable)**

via: personal service of process

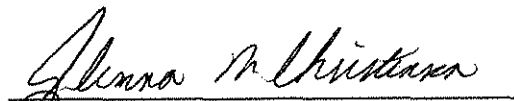
✓ regular U.S. Mail

via: personal service of process

regular U.S. Mail

via: personal service of process

regular U.S. Mail


Signature

24

Glenna Christensen, ISB No. 2333
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Boulevard, 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone: (208) 345-2000
Facsimile: (208) 385-5384
14-400.224

Attorneys for Defendants

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT STODDARD,)
)
Claimant,)
)
vs.)
)
THE HAGADONE CORPORATION,)
)
Employer,)
and)
)
ROYAL INDEMNITY COMPANY,)
)
Surety,)
)
Defendants.)
_____)
ROBERT STODDARD,)
)
Claimant,)
)

I. C. No. 99-016897 ✓
96-018310
97-036904

MOTION TO CONSOLIDATE

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INDUSTRIAL COMMISSION

vs.)
)
HAGADONE CORPORATION,)
)
Employer,)
)
and)
)
GENERAL INSURANCE COMPANY OF)
AMERICA,)
)
Surety,)
)
Defendants.)
_____)

COME NOW the defendants The Hagadone Corporation and Royal Indemnity Company, by and through undersigned counsel, and move that this matter be joined with two other cases presently pending before this Commission, I.C. Nos. 96-018310 and 97-036904. The motion is made for the reason that the claims are all filed by the same claimant against the same employer. Though the sureties differ, defendant believe it would promote judicial economy to consolidate the matters for hearing.

DATED this 8th day of May, 2000.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Glenna Christensen
Glenna Christensen - Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

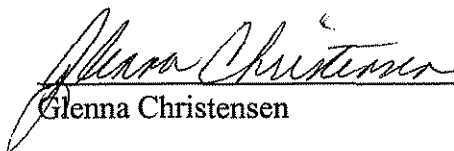
I HEREBY CERTIFY that on the 8th day of May, 2000, I caused a true and correct copy of the foregoing **MOTION TO CONSOLIDATE** to be served by the method indicated below, and addressed to the following:

John T. Mitchell
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408 East Sherman, Suite 316
Coeur d'Alene, ID 83814-2778
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 ISB #3737

Attorneys for Defendants

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT STODDARD,)
)
 Claimant,)
)
 vs.)
)
 HAGADONE CORPORATION,)
)
 Employer,)
)
 and)
)
 GENERAL INSURANCE COMPANY)
 OF AMERICA,)
)
 Surety,)
 Defendants.)

I.C. Nos: 96-018310
 97-036904

RESPONSE TO MOTION FOR
 CONSOLIDATION AND REQUEST
 FOR MEDIATION

INDUSTRIAL COMMISSION

MAY 17 2000

FILED

Defendants Hagadone Corporation and General Insurance Company of

America have no objection to the Motion to Consolidate Case Nos. 96-018310, 97-036904


RESPONSE TO MOTION FOR
 CONSOLIDATION AND
 REQUEST FOR MEDIATION

with Case No. 99-016897, and defendants join in the request for mediation.

DATED this 15th day of May, 2000.

CLEMENTS, BROWN & McNICHOLS, P.A.

By


BENTLEY G. STROMBERG
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May, 2000, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

John T. Mitchell
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 X U.S. MAIL
 HAND DELIVERED
 OVERNIGHT MAIL
 TELECOPY (FAX)


Bentley G. Stromberg

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT J. STODDARD,

Claimant,

v.

THE HAGADONE CORPORATION,
Employer,

and

GENERAL INSURANCE COMPANY
OF AMERICA, Surety,

and

ROYAL INDEMNITY COMPANY,
Surety,

Defendants.

IC 96-018310

97-036904

99-016897

ORDER GRANTING
MOTION TO CONSOLIDATE

FILED

MAY 19 2000

INDUSTRIAL COMMISSION

On May 9, 2000, Defendant Royal Indemnity Company filed a Motion to Consolidate I.C. Nos. 99-016897 with 96-018310 and 97-036904. The latter two cases were consolidated at Claimant's request by order filed June 29, 1999. On May 15, 2000, Claimant filed Claimant's Opposition to Defendant Employer/Royal Indemnity Company's Motion to Consolidate. Defendant General Insurance Company of America filed a response on May 17, 2000, stating they have no objection to Defendant Royal Indemnity Company's Motion to Consolidate.

Claimant argues that consolidation is not appropriate because the injuries and sureties are different and the cases are in different stages of discovery. Further, Claimant has not reached

ORDER GRANTING MOTION TO CONSOLIDATE - 1

medical stability in the latest case. The Referee is not persuaded. An issue in the prior two cases (I.C. Nos. 96-018310 and 97-039604) is disability above impairment. That issue cannot be addressed until Claimant is medically stable. Further, none of the cases have been set for hearing, and presumably will not be until Claimant has reached medical stability in the latest case.

The Referee finds consolidating these matters is appropriate. THEREFORE, IT IS HEREBY **ORDERED** that those claims presently pending before the Industrial Commission known as **IC Nos. 96-018310, 97-036904, and 99-016897** are hereby consolidated into a single proceeding. Future pleadings require reference to the three IC numbers listed above, but only a single document need be filed with the Commission.

SO ORDERED.


DATED in Boise, Idaho, on this 19 day of May, 2000.

INDUSTRIAL COMMISSION



Michael E. Powers, Referee

ATTEST:


Assistant Commission Secretary

ORDER GRANTING MOTION TO CONSOLIDATE - 2

CERTIFICATE OF SERVICE

I hereby certify that on the 19 day of May, 2000, a true and correct copy of **ORDER GRANTING MOTION TO CONSOLIDATE** was served by regular United States mail upon each of the following persons:

JOHN T MITCHELL
408 E SHERMAN STE 316
COEUR D'ALENE ID 83814-2778

BENTLEY G STROMBERG
PO BOX 1510
LEWISTON ID 83501-1510

GLENNA M CHRISTENSEN
PO BOX 829
BOISE ID 83701-0829

cjh



BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT J. STODDARD,)
)
 Claimant,)
)
 v.)
)
 THE HAGADONE CORPORATION,)
)
 Employer,)
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 and)
)
 GENERAL INSURANCE COMPANY)
 OF AMERICA,)
)
 Surety,)
)
 and)
)
 ROYAL INDEMNITY COMPANY,)
)
 Surety,)
 Defendants.)
)

IC 96-018310
97-036904
99-016897

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

FILED
SEP - 7 2001
INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Coeur d'Alene, Idaho, on March 14, 2001. Claimant, Robert J. Stoddard, was present and represented by John T. Mitchell of Coeur d'Alene. Bentley G. Stromberg of Lewiston, Idaho, represented Employer, The Hagadone Corporation (Hagadone), and Surety, General Insurance Company of America

FINDINGS, CONCLUSIONS, AND RECOMMENDATION - 1

(General).¹ Glenna M. Christensen of Boise, Idaho, represented Hagadone and Surety, Royal Indemnity Company (Royal).² Oral and documentary evidence was presented. Five post-hearing depositions were taken. The parties submitted post-hearing briefs and this matter is now ready for a decision.

ISSUES

The issues to be decided as the result of the hearing are:

1. Whether, and to what extent, Claimant is entitled to reasonable and necessary medical care arising from his May 11, 1999, accident and injury;
2. Whether, and to what extent, Claimant is entitled to temporary total disability (TTD) benefits arising from his May 11, 1999, accident and injury;
3. Whether, and to what extent, Claimant is entitled to permanent partial impairment (PPI) benefits arising from all three accidents/injuries;
4. Whether, and to what extent, Claimant is entitled to permanent partial disability (PPD) benefits, including whether Claimant is permanently and totally disabled pursuant to the odd-lot doctrine; and,
5. Whether Claimant is entitled to attorney's fees due to Royal's unreasonable termination of his physical therapy benefits regarding his May 11, 1999, accident and injury.

CONTENTIONS OF THE PARTIES

Claimant contends he is permanently and totally disabled as the result of injuries to his groin and back as the result of three separate industrial accidents during his employment as a

¹ General was Hagadone's surety for Claimant's May 5, 1996, and October 10, 1997, accidents and injuries.

² Royal was Hagadone's surety for Claimant's May 11, 1999, accident and injury. All three claims were consolidated by Order filed May 19, 2000.

FINDINGS, CONCLUSIONS, AND RECOMMENDATION - 2

ground's keeper at Duane Hagadone's summer home on Casco Bay on Lake Coeur d'Alene. He further contends that Royal owes him attorney's fees for unreasonably terminating payment for the physical therapy prescribed by his treating physician based on the report of their retained evaluator.

General contends that they have paid Claimant all the benefits to which he is entitled and deny he has incurred any disability above his impairment. They further contend that if the Commission determines that Claimant has incurred disability above impairment, such is due to an intervening non-industrial motor vehicle accident (MVA), and Claimant's last industrial accident and injury that is Royal's responsibility. Royal agrees with General that Claimant has incurred no disability above impairment, because he incurred no impairment regarding the May 11, 1999, injury. Further, if he has incurred any disability, it is as the result of his MVA for which Claimant has been duly compensated.

Claimant responds that this case boils down to whom the Commission chooses to believe regarding disability; his neutral witnesses or Defendants' retained witnesses.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
 2. The testimony of Claimant and Industrial Commission Rehabilitation Division (ICRD) Consultant Daniel W. Brownell taken at the hearing;
 3. Claimant's Exhibits 1-27 and Defendants' Exhibits A-G admitted at the hearing;
- and,

FINDINGS, CONCLUSIONS, AND RECOMMENDATION - 3

4. The post-hearing depositions of: Daniel W. Brownell taken by General on February 27, 2001; Paula Taylor taken by Claimant and Stephen R. Sears, M.D., taken by General on April 12, 2001; William Shanks, M.D., taken by Claimant, and Daniel R. McKinney, and Warren J. Adams, M.D., taken by Royal all on April 13, 2001.

The objections made during the taking of the depositions of Dr. Shanks and Daniel McKinney are overruled.

After having considered all the above evidence, and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

Background

1. Claimant was 64 years of age at the time of the hearing. In 1993 he began working for Duane Hagadone as a care taker/ground's keeper at Hagadone's summer home on Casco Bay on Lake Coeur d'Alene. He also had a business doing topiary or ornamental shrubbery work as well as regular shrub trimming. Claimant would generally work for Hagadone from April through October and do his topiary work "on the side." Hagadone was aware of his topiary business. Claimant's duties at Hagadone's residence included ferrying workers and service people by boat to and from the home,³ mowing the lawn about four times a week, watering in areas not covered by the watering system, cleaning the boats in the boat garage, cleaning the beach daily, and generally keeping the residence operational. He earned \$12.00 an hour at the time of his last injury and was paid for an eight-hour day five days a week. Claimant described his work at the residence this way:

³ There was no road access to the residence.

FINDINGS, CONCLUSIONS, AND RECOMMENDATION - 4

Q. Can you describe for Referee Powers what sort of enjoyment you got or what sort of satisfaction you got from this job?

A. Well, I love the spot because I don't think there's a prettier spot in the world than that place at Casco Bay. It's just a gorgeous, beautiful area. And it was fresh air every day. You were outside. You were able to see the beauty of the work that you did daily. And it was a lot of personal satisfaction because I was responsible for all the work that was going on there, except the flower girls. And there were two flower girls that worked over there. And they did their share on the property as well.

Hearing Transcript, pp. 45-46.

The accidents/injuries and course of medical treatment

May 5, 1996, (hernia).

2. Claimant described his May 5, 1996, accident as follows:

Q. What happened?

A. I was standing in the boat which was tied up to the dock. And the boat was, oh, at least two feet deep. And one leg was on the dock and one leg was down in the boat. And so you – I was trying to stabilize and steady it. And I was reaching down and grabbing – they were about – I think 16 flowers was in each 4-inch pot, were in a flat. And they were full of water because they were wetted down over at the hotel.

And I had been doing it most of the day. And I was pretty tired by then. And I reached down and grabbed one and felt something tear in my left groin. And I don't know how to describe it other than it was just very painful and felt like something had given away there in my left groin.

Hearing Transcript, p. 57.

3. On May 15, 1996, Claimant presented to Dr. Wilbur Lyon, a neighbor and general surgeon, who diagnosed a left groin strain and a small, asymptomatic inguinal hernia. Dr. Lyon recommended against surgery at that time. Claimant missed no time from work but did have episodes where the hernia/strain would flare up and become painful. Claimant was able to perform his duties at Hagadone's as well as with his topiary business. Sometime after the 1996

FINDINGS, CONCLUSIONS, AND RECOMMENDATION - 5

season, an employee of Hagadone's contacted Claimant and suggested that he take care of the hernia in the off-season. Claimant obliged and reported back to Dr. Lyon, who was going on vacation. Claimant saw Dr. Lyon's partner, Dr. Pennings, who performed a left inguinal hernioplasty with mesh on February 26, 1997. Claimant's Exhibits 5 and 6.

4. Claimant explained his post-surgery recovery as follows:

Q. What happened after that surgery?

A. Well, as soon as the drugs wore off from the surgery itself, I knew I had a real serious problem. And I felt tremendous pain in my left groin and in my pubic area and in my left testicle. It felt like somebody grabbed my scrotum and ripped it or something of that nature. It was extremely uncomfortable and extremely painful.

Matter of fact, I called Dr. Pennings right away and told him. I said, What happened? And I told him where I was in extreme pain. And he said there's nothing wrong with you. You've got to let this heal. Well, my body told me totally different. I knew I had a problem and a serious one.

Hearing Transcript, p. 63.

5. Claimant also experienced numbness in his left groin into his left hip and left low back. He returned to work in April of 1997 but experienced pain and needed help from the "flower girls." He could no longer do his topiary and shrubbery work. He gained weight and discovered he had high blood pressure. Nonetheless, he missed no work following his hernia surgery. Eventually, on November 14, 1997, Dr. Robert West performed a neurolysis of Claimant's left ilioinguinal nerve and removed the disrupted Gore-Tex mesh previously placed by Dr. Pennings. Claimant's Exhibit 2.

6. The second surgery relieved the cramping in Claimant's groin but did not relieve the pain or the numbness.

July 24, 1997, (neck, left shoulder, low back).

FINDINGS, CONCLUSIONS, AND RECOMMENDATION - 6

7. On July 24, 1997, Claimant was rear-ended while waiting at a traffic signal. He was on his way home from a party at Hagadone's summer residence. He is not alleging the MVA is work related. Claimant experienced pain in his neck, left shoulder, and right low-back above his waist. Claimant missed no work as the result of the MVA. He presented to Dr. West on July 28, 1997, who diagnosed an acute cervical strain and prescribed physical therapy. The physical therapy did little to improve Claimant's symptoms, however on September 3, 1997, Dr. West noted that Claimant's cervical strain was "resolving very satisfactorily." Claimant continued to experience problems with his left shoulder, particularly when lifting. He eventually saw Dr. Graeme French, an orthopedic surgeon, who recommended surgery; Claimant declined. Dr. French also noted that Claimant was suffering from sleep apnea for which treatment was recommended.

October 10, 1997, (low back).

8. Claimant testified at the hearing as follows regarding the "flower pot" incident:

Q. Can you describe for Referee Powers your October I believe it was the 10th, 1997, injury at work?

A. I had had -- we had a building on the property that was out behind the main house. And it was a storage shed. And there was lumber -- or not lumber -- some lumber and mainly wood storage there for the fireplaces. And we had a sliding door on it. And so it didn't open up real wide.

And I would take some of the flower pots and put them on a hand truck and take them up and take them through that door and store them in there because they wouldn't lose their paint over the wintertime if you would keep them under cover.

And so we had some pots out there that were really huge and real heavy. And I was taking one of those through the door, and I had to bend over with it on the hand truck and try to bring one side through first and then bring the hand truck around to the other side to get the other side through the door, because they were built on a funnel shape.

FINDINGS, CONCLUSIONS, AND RECOMMENDATION - 7

And as I was doing that, I felt something pop right in the middle of my low back. And it was extremely painful. And from that time on, it's been there. And it's never – never really improved from that time on.

Hearing Transcript, pp. 89-90.

9. Claimant testified that the low back pain he experienced as a result of the flower pot incident was different than the low back pain he experienced in the MVA because the latter was in a different area of his back. Claimant reported the back pain to the physical therapists he was seeing for his left shoulder condition. He testified that they had him sit on the edge of a bench and roll his hips to strengthen his back. Instead, the maneuver caused him so much pain that he discontinued physical therapy and decided to walk for exercise instead. He was able to finish the 1997 and 1998 seasons without missing work, but with some assistance.

May 11, 1999, (back).

10. On May 11, 1999, Claimant had another accident that he described as follows:

Q. What happened on May 11th?

A. I was mowing the lawn, and Brian I believe had replaced the lawn mowers that were out there. We had a large, heavy Toro mower. And for some reason that wasn't on [the] property anymore. And we had a lighter weight John Deere mower.

And I depended on the weight of the mower on this one area that had a severe bank. And I was mowing across the top of the bank, and there's quite a grade there, I don't know, somewhere around 30 to 35 percent. And it was quite severe. I'd even taken my tennis shoes out there because I knew it was mowing day. And I wanted to have more traction if I could.

But I didn't realize, I think at the time, that we had – didn't have the larger, heavier mower, my feet slipped out from under me, and I came straight down on my buttocks. And it changed my life.

Hearing Transcript, pp. 101-102.

FINDINGS, CONCLUSIONS, AND RECOMMENDATION - 8

11. Claimant presented to Dr. William Shanks, an orthopedic surgeon in Spokane, Washington, on June 3, 1999, after being originally treated by Dr. West, an internist. Dr. Shanks noted:

"The present CT shows worsening of the degenerative changes with the anterior spurring and significant degenerative arthritis involving the facet joints especially at 4-5 and the lumbosacral area and there is evidence of early stenosis especially lateral recess stenosis at 4-5. His symptoms seem to be most suspicious for this type of injury and the acute fall aggravated the facet joint arthritis giving him the acute symptoms that he has now. ... I think that he will gradually have progression of the symptoms."

Claimant's Exhibit 1, pp. 3-4.

Dr. Shanks prescribed physical therapy that included walking on a treadmill.

12. Claimant has not worked since May 11, 1999.

13. Claimant is a credible witness.

Further medical care as the result of the May 11, 1999, accident/injury

Idaho Code § 72-432(1) obligates an employer to provide reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See, Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P. 2d 395 (1989).

14. Claimant contends Royal is liable for the payment of medical expenses in the form of physical therapy and treadmill exercises prescribed by Dr. Shanks as well as a portion of Dr. Shanks' fees, and cites Poss v. Meeker Machine Shop, 109 Idaho 920, 712 P.2d 621 (1985) in support of his contention. In Poss, the Supreme Court affirmed a Commission decision awarding medical benefits for treatment considered to be "... only palliative and of little curative value." Dr. Shanks, Claimant's treating physician, prescribed physical therapy that

included the use of a treadmill. Royal terminated the payment of Claimant's physical therapy, based on their interpretation of the conclusions reached by Dr. Warren Adams, who saw Claimant at their request. Claimant testified the treadmill helped in particular because he could use the handrails for support and to take some pressure off his back. In his deposition, Dr. Adams testified as follows regarding the continuation of Claimant's physical therapy:

Q. Okay. So I take it you're recognizing the fact the physical therapy was helping with his pain?

A. According to the medical records.

Q. Did you have any reason to doubt that it wasn't?

A. No.

Q. Should the insurance company have refused to pay for continuing physical therapy based on your report?

A. I don't know - I can't comment on that one way or the other.

Q. Well, I'm asking you to. Why can't you comment on it?

A. Because I don't know why the insurance company stopped his physical therapy.

Q. Based on your report. Should the insurance company have stopped his physical therapy based on your report?

A. Well, I went on to say there's no additional treatment that has a high probability of significantly improving his chronic low back pain.

Q. Okay. And by that did you mean that his physical therapy should be discontinued?

A. I didn't make an opinion at that time in reference to that. I don't think I mentioned that on *[sic]* the report.

Q. Does your report say anywhere that physical therapy should be discontinued?

A. I don't think it's in there.

FINDINGS, CONCLUSIONS, AND RECOMMENDATION - 10

Q. Does your report say anywhere that the physical therapy's unreasonable?

A. No.

Dr. Adams' Deposition, pp. 29-30.

15. The Referee is unaware of any statute or case law that requires a medical treatment or procedure to have a "high probability of significantly improving" a condition before that treatment is approved and paid for by an employer or surety. Here, the treadmill may be said to have "significantly improved" Claimant's condition, even though that is not the standard by which to judge the treatment. After the costs associated with Claimant's treatment were terminated by Royal, Dr. Shanks wrote them a letter imploring them to resume payment for the program. Royal refused. The Referee finds that Dr. Shanks' treatment as well as the physical therapy program he prescribed were necessary and even Dr. Adams said the treatment was reasonable. The Referee finds that Royal is liable for any unpaid costs associated therewith and for the costs of any further physical therapy and/or the use of a treadmill should Claimant's treating physician deem it still necessary.

The Referee is unable to determine from the record the monetary amount of the benefits Claimant is seeking for unpaid medical and physical therapy bills. Therefore, counsel for Claimant and Royal are encouraged to agree upon an amount reflecting any unpaid medical and/or physical therapy bills.

Further TTD benefits as the result of the May 11, 1999, accident/injury

16. Royal terminated Claimant's TTD benefits on December 6, 1999, based on Dr. Adams' November 11, 1999, report stating Claimant had reached maximum medical improvement (MMI) as of that date. Claimant argues that he is entitled to additional TTD

FINDINGS, CONCLUSIONS, AND RECOMMENDATION - 11

benefits from December 6, 1999, to April 2000 when Dr. Shanks determined Claimant to be medically stable.

Idaho Code § 72-408 provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a claimant to present medical evidence of the extent and duration of the disability in order to recover income benefits for such disability. Sykes v. C.P. Clare and Company, 100 Idaho 761, 605 P. 2d 939 (1980).

17. Dr. Adams testified that Claimant had reached MMI as of the time he evaluated him on November 11, 1999. He did not say when that MMI was reached. Dr. Shanks treated Claimant specifically for the May 11, 1999, accident. He followed his care until March 13, 2001. He testified that even though he still had symptoms, Claimant reached MMI in April 2000. He did not give the exact date in April. The Referee gives more weight to the opinion of Dr. Shanks regarding medical stability than that of Dr. Adams, who saw Claimant only once. The Referee finds that Claimant is entitled to additional TTD benefits from Royal for the period of December 6, 1999, through April 30, 2000. This equates to an award of \$6,707.66.

PPI benefits

"Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured worker's personal efficiency in the activities of daily living, such a self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the

opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

May 5, 1996, accident/injury.

18. Dr. West, who performed Claimant's second surgery on November 14, 1997, gave Claimant a five percent whole person PPI rating on April 27, 1998. When questioned by General regarding the basis for his rating, Dr. West responded by indicating that the range of PPI according to the *AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition*, (Guides), is between ten percent - 19%. Then, on October 17, 1998, after having a telephone conversation with an adjuster for General, Dr. West settled on a ten percent PPI rating. Claimant's Exhibit 2. The Referee finds Claimant incurred a ten percent whole person PPI rating as the result of his May 5, 1996, accident/injury.

October 10, 1997, accident/injury.

19. Claimant initially treated with Dr. Richard Treloar for the low back strain/sprain he suffered as the result of the "flower pot" incident. Dr. Treloar assigned no PPI for that injury. Dr. Shanks also treated Claimant for that injury and agrees with Dr. Treloar's PPI assessment. Due to Dr. Shanks' health problems, Claimant also saw Dr. Graeme French for his back strain/sprain. In an office note dated April 5, 1999, Dr. French wrote: "In terms of his low back, I think he is a category III lumbar impairment because of the radiographic findings and chronic spasm lasting over six months without a fixed neurologic deficit." Claimant's Exhibit 3, p. 3. Dr. French does not explain what a "Category III" is or what percentage of a whole person impairment it represents. However, Dr. Shanks in his deposition testified that a "Category III" is

a Washington Department of Labor and Industry category⁴ that equates to a ten percent whole person PPI under the Guides. Dr. Shanks gave Claimant a ten percent whole person PPI rating but apportioned that rating on a 50/50 basis between Claimant's pre-existing degenerative disc disease and his May 11, 1999, injury. Dr. Stephen Sears, to whom Claimant was sent by General, and Dr. Adams, to whom Claimant was sent by Royal, assign no PPI for Claimant's back regardless of the cause. The Referee finds that Claimant has incurred no PPI as the result of his October 10, 1997, accident/injury.

May 11, 1999, accident/injury.

20. Dr. Shanks was Claimant's primary treating physician for the "slip and fall" incident. He gave Claimant a five percent whole person PPI rating for that injury. As mentioned above, Drs. Sears and Adams gave Claimant no PPI for his back from any cause. Dr. Shanks testified that the five percent rating was in addition to the five percent rating he gave Claimant for his pre-existing disc disease because he was more symptomatic after the May 11, 1999, injury. Again, the Referee places more weight on the testimony of Dr. Shanks who has been more involved with Claimant's low back condition than the other physicians. The Referee finds that Claimant incurred an additional five percent whole person PPI as the result of his May 11, 1999, injury. This equates to an award of \$6,270.00.

PPD benefits

"Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no functional or marked change in the future can be reasonably expected. Idaho

⁴ Dr. French practices in Colfax, Washington.

Q. As far as what? Lifting or . . .

A. As far as doing some raking or things of that nature and helping me get the flower pots out that year and things like that.

Q. Did you do any topiary or shrubbery work in 1997?

A. No.

Q. Why?

A. I was too uncomfortable all the time. I couldn't do it. I wasn't ready and I wasn't healed. I know from what was going on in my back and I my – groin. It was very uncomfortable.

Hearing Transcript, pp. 65-66.

23. Claimant testified that after his second hernia surgery in November 1997, his cramping was relieved but not his groin pain. On March 30, 1998, Dr. West released Claimant to return to his regular duties but imposed a permanent thirty-pound lifting restriction on an occasional basis. Claimant's Exhibit 2, pp. 18-19. General argues that Claimant is entitled to no PPD because his wages increased between the time of his hernia and his last accident. However, a wage comparison is but one factor to consider in a PPD analysis. When taking into account the ten percent PPI assigned by Dr. West, the permanent lifting restriction, Claimant's testimony regarding the unresolved symptomatology, and the non-medical factors discussed in Idaho Code §72-430 and in the "odd-lot analysis" section of this decision, the Referee finds that Claimant's ability to engage in gainful activity has been reduced and he has incurred PPD as the result of his May 5, 1996, hernia injury of 20% of the whole person inclusive of his ten percent PPI.

May 11, 1999, slip and fall.

24. Claimant testified as follows regarding the effects of his slip and fall while mowing on May 11, 1999:

FINDINGS, CONCLUSIONS, AND RECOMMENDATION - 16

Q. I just want to get a little bit more specific. What did you feel when you fell?

A. I felt just total shock in my butt and my back and tried to sit there for a while and get my bearings and let things kind of settle in. And then I crawled to my feet and tried to get things over with.

Q. As far as your work that day?

A. Yes.

Q. How far into your day of work did this happen?

A. I think this was about up to the final hour is when it was going on.

Q. Where exactly was the increased pain or the different pain located?

A. It was right smack-dab in the low back. Right in here.

Q. How is it different from your prior low back pain?

A. And from now on, when I was on my feet and if I walk on any grade of any sort, it seems like I lose all the strength in the back of my legs back here. And it feels like I'm going down on my knees, like I can't continue and don't have any strength left in my legs. And that's -- and also at that time this started going numb this way and down this leg.

Q. Down the right --

A. More severe. Yes.

Q. Anything else you can use to distinguish your prior low back injury from the pain you were having now on May 11th, 1999?

A. Well, it -- from that time on, everything was worse and more severe. It was now at the point where it's a constant thing. The only thing I can do that seems to get any relief is to move and transfer my weight at nighttime, when I'm at home I -- or even during the day, I go from my chair to another love seat that I've got in the house to the floor and I -- if I'm able to shift the weight on my low back, it seems to give me some pain relief.

Hearing Transcript, pp. 103-104.

FINDINGS, CONCLUSIONS, AND RECOMMENDATION - 17

25. It was after the May 11, 1999, slip and fall that Claimant began treating with Dr. Shanks. Dr. Shanks testified that the slip and fall "significantly aggravated" his prior symptoms. He described the mechanics of the injuries caused by the May 11, 1999, slip and fall as follows:

Q. Help me understand how that aggravates and flares up?

A. It would be a compression-type injury. When you fall on your buttocks, the forces go through the spine from the impact.

Q. Is this an injury to the muscles or to the joints?

A. Well, there is usually both involved. It would be an aggravation to degenerative disk from compression. It might cause the disk to compress a little more or bulge out a little more.

It would aggravate the joints because they are going to be compressed as well, so they would probably be more sore.

Soft tissues can be injured by tearing a little amount of muscle. It is difficult to make that diagnosis. As far as findings on X-ray or CT or MRIs usually don't show a great deal of change there.

Dr. Shanks' Deposition, p. 12.

26. Dr. Shanks testified that if it wasn't for the May 11, 1999, slip and fall, Claimant would still be working. Claimant credibly testified that as the result of the slip and fall he was no longer able to work for Hagadone. When taking into account Dr. Shanks' five percent whole person PPI as well as the non-medical factors discussed in Idaho Code § 72-430 and in the "odd-lot analysis" section of this decision, the Referee finds that Claimant has incurred a 60% whole person PPD inclusive of PPI as the result of the May 11, 1999, accident/injury.

27. In summary, the Referee finds that Claimant has incurred PPI of 15% of the whole person and PPD of 80% of the whole person inclusive of the 15% PPI as the result of his May 5, 1996, and his May 11, 1999, accidents and injuries. *deleted per Recon.*

FINDINGS, CONCLUSIONS, AND RECOMMENDATION - 18

Odd-lot analysis

There are two methods by which a claimant can demonstrate that he or she is permanently and totally disabled. The first method is by proving that his or her medical impairment together with the relevant non-medical factors totals 100 percent. If a claimant has met this burden, then total and permanent disability has been established. The second method is by proving that, in the event he or she is something less than 100 percent disabled, he or she fits within the definition of an odd-lot worker. Boley v. State Industrial Special Indemnity Fund, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997).

An odd-lot worker is one "so injured the he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." Bybee v. State of Idaho, Industrial Special Indemnity Fund, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996), *citing* Arnold v. Splendid Bakery, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). Such workers are not regularly employable "in any well-known branch of the labor market – absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." Carey v. Clearwater County Road Department, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984), *citing* Lyons v. Industrial Special Indemnity Fund, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1977).

The burden of establishing odd-lot status lies with the claimant. Rost v. J.R. Simplot Company, 106 Idaho 444, 445, 680 P.2d 866, 867 (1984).

28. Claimant has worked with ICRD Consultant Dan Brownell (Brownell) beginning January 27, 1998, as a result of his hernia injury. Brownell closed his file on May 12, 1998, as Claimant had returned to work for Hagadone with a 30 pound lifting restriction. Brownell re-opened his file on May 20, 1999, after Claimant's slip and fall on May 11, 1999. In February

2000, Brownell assisted Claimant in beginning a job search. In April 2000, a representative of Hagadone informed Brownell that they would not be re-hiring Claimant. Claimant made over 80 employer contacts, although he testified that he did not apply for a specific job because no specific job was ever offered. Brownell testified that he recommended that a functional capacities evaluation (FCE) be done because:

Q. Who recommended the functional capacities evaluation being done by Paula Taylor in Mr. Stoddard's case?

A. I did.

Q. Why?

A. I saw too much confusion in regards to the medical, too much opinions from one extreme to another.

Q. What do you mean by that?

A. Well, we saw real conservative. And then you have one – from one side you had Dr. Shanks limiting Bob to approximately 20 pounds lifting and so on and so forth in his reports. And then you have Dr. Sears who is saying there's no impairment or no physical limitations hardly at all.

Q. And Dr. Adams, where would he fit in that?

A. Seems like he was a little bit in between both.

Hearing Transcript, p. 154.

29. Paula Taylor (Taylor) performed the FCE on February 21 and 22, 2001. The testing took from three to three and one-half hours each day. Taylor described the benefits of an FCE over a physician's evaluation this way:

Q. What are the advantages of a performance-based functional capacities evaluation, just in the general sense, regardless of who's doing it, versus a doctor just filling in the blanks or anyone else just trying to –

A. Well, I think the benefit is that it's done by a therapist, No. 1, and our background is that we know how the body works and we know what the body

FINDINGS, CONCLUSIONS, AND RECOMMENDATION - 20

looks like when it's under duress or fatigued. A performance-based evaluation provides more realistic qualifications or limitations of the person, because you have them actually do the activity, you're watching them, you look at their blood pressure and their pulse and their body as it reacts to the weight, so you've actually tested the activity, whereas the other cases you may just be getting a subjective report from the patient as to how they can do things.

Taylor's Deposition, pp. 7-8.

30. Taylor uses the Isernhagen system in conducting FCEs. She described that system as having 13 built in consistency checks that determine the validity of each activity being tested. The person tested does not know the amount of weight they are lifting and the testers are trained to watch the changes in physiology as the weight increases and check for consistency between subjective complaints and how the body reacts to the various activities tested. Taylor believes the test is objective:

Q. Okay. Now, in your opinion, how objective is the Isernhagen system?

A. I believe it is very objective.

Q. And why is that?

A. Because of everything that I've said. The training, the expectation that we have a certain level of performance, the fact that it's based on what I was trained on in school, which was how the body moves and reacts to stresses, and because of the way it is designed with the repetitive consistency checks throughout the two days of testing. It's a two-day test. That in itself allows a lot of objectivity. And again, like I said, the fact that we retest multiple activities in different ways and they should all come out the same. And if they do, they're consistent. And if they don't, they're labeled inconsistent performers.

Taylor's Deposition, pp. 16-17.

31. As the result of her testing, Taylor concluded that Claimant could perform work in the sedentary to light work categories for no more than four hours a day due to his deconditioning⁵ and complaints of pain.

32. Brownell testified at the hearing that he agrees with Taylor's assessment:

Q. Do you agree or disagree with Paula Taylor's reports?

A. I agree.

Q. Why?

A. Because I have no reason not to. It's an excellent report. It's a standard within the workers' compensation system to use the Isernhagen type of functional capacities evaluation. I have had experience with Paula Taylor as being a very good physical therapist over the last 15 years. She's helped us return many, many injured workers to work through her program, work hardening. She's accomplished, to my knowledge, hundreds of physical capacities evaluations with in this area. And I have no reason to disagree with her report.

Hearing Transcript, pp. 163-164.

33. It is Brownell's opinion that Claimant is unemployable absent a sympathetic employer who would let him be absent more than about one day a month and who would let him lay down and rest as needed. He did testify, however, that there are part time jobs in Claimant's labor market consistent with Taylor's restrictions, but not in "significant numbers."

34. Royal retained certified rehabilitation counselor Daniel R. McKinney of Spokane, Washington, to conduct a vocational evaluation of Claimant. McKinney has worked as a vocational counselor since 1980. He met with Claimant on February 28, 2001. He identified the following transferable skills:

⁵ Claimant testified that he began gaining weight after his hernia injury and became further deconditioned after Royal ceased paying for his physical therapy and the use of the treadmill. Dr. Shanks corroborated Claimant's testimony in that regard.

Q. What kind of skills did you identify that you felt would be of value in [sic] him, in helping him find work?

A. Well, Mr. Stoddard's education included three-plus years of college. He didn't graduate from high school, but he went to college after high school, and he also had years in the wholesale meat business, wholesale beer business. He had fifteen years in insurance sales and meat company sales, and then he had many years in grounds keeping and lawn care and in skilled shrubbery care, and so he has skills in a number of areas that would help him in terms of making him more attractive as a job candidate.

McKinney's Deposition, pp. 7-8.

35. McKinney does not think Claimant faces "insurmountable barriers" in finding employment:

Q. Okay. Are there any other factors that would concern you about being able to locate a job for Mr. Stoddard other than the depression⁶ which you mentioned?

A. Well, and as I said at the beginning of my testimony, we have some kind of conflicting medical evidence and so it depends on what assumptions you make, but I think – you know, I think he has some barriers. I think that, you know, his age under certain circumstances can be a barrier. Certainly four hours of work a day isn't eight hour of work a day and that's going to erode his base, but I don't think it's insurmountable – I don't think he has insurmountable barriers, assuming that he can consistently function in a work environment day after day.

McKinney's Deposition, pp. 16-17.

36. However, when questioned about Claimant's need to lay down periodically throughout the day, McKinney testified:

Q. If in fact he needs to lay down periodically through the day at unpredictable times, would he be disabled, totally and permanently disabled?

⁶ Both Dr. Sears and Dr. Shanks believe Claimant is suffering from depression to varying degrees. Claimant himself agrees that he is depressed, mostly due to his inability to find work.

A. If he had to lay down periodically throughout the day at unpredictable times, in my opinion he wouldn't maintain – couldn't maintain consistent – couldn't maintain competitive employment.

Q. And if he couldn't work a day or two a week, perhaps even more, could he obtain employment and could he retain that employment?

A. No, he couldn't. He might be able to obtain it, but he couldn't keep it.

McKinney's Deposition, p. 26.

Failed work attempt.

37. Claimant has not attempted any employment since his May 11, 1999, accident and injury. The Referee finds Claimant has failed to prove he is permanently and totally disabled by this method.

Work search.

38. With Brownell's assistance, Claimant contacted over 80 "potential" employers, although he was not aware whether there were any positions actually available. Brownell testified that such contacts were made at his suggestion because of the "hidden job market." That is, it is more effective to "apply" for a job before there is an actual opening rather than compete with many other job seekers once an opening is announced. Brownell has no doubt that Claimant contacted the employers that he said he did because he trusts Claimant. Brownell testified as follows regarding his opinion of why Claimant was unsuccessful in his job search:

Q. You mentioned in response to Mr. Stromberg's questions that with 80 to 100 employer contacts, there's very good success of getting a job and that failing is – is unusual – very unusual; is that correct?

A. That's been my experience, yes.

Q. Okay. But it does happen where –

A. It does happen.

Q. -- even with this amount contacts, a person doesn't get placed?

A. Yes. I see that as more of a -- when it does happen, it's more proof in the pudding to me than anything else of some reasons why a person isn't getting a job. And all the factors of transferable skills, education, age, all those factors kind of send a message back to me that there's something -- something -- some good reason why this person isn't getting employment.

Q. And what is that reason in Mr. Stoddard's case?

A. I think it can be a combination of all of the above that I just mentioned.

Q. Which is?

A. Age, physical capabilities -- the employers maybe didn't know about, but I think it is a factor -- motivation, as far as, you know, his depression and flat affect and things like that.

Hearing Transcript, pp. 194-195.

39. Claimant summed up his job search endeavors this way:

Q. Do you feel you need any treatment for that [depression]?

A. Well, I have a strong faith, and I read daily my Scriptures. I take my faith very seriously. I pray every day. And I feel I get a great amount of comfort out of that. It's been very difficult for me to go out and make all the contacts I have and not have a positive result because of it. But I'm also very realistic.

I know that my age is a factor, and it was a factor when I was 50 years old and living in Coeur d'Alene and with half gray hair, it was a factor then. So I'm not kidding myself, as some people in this room might kid themselves [*sic*] about getting old.

When you're my age and you're looking for a job you've had that experience. And when you haven't gotten this age and you aren't looking for a job, you really don't know what we're going through. And most people in this room don't fit in that category. But Coeur d'Alene is tough.

Hearing Transcript, pp. 233-234.

40. The Referee finds that Claimant has proven he is permanently and totally disabled pursuant to the odd-lot doctrine by the failed job search method. Significantly, according to

FINDINGS, CONCLUSIONS, AND RECOMMENDATION - 25

Brownell, Hagadone is the Coeur d'Alene area's third largest employer with a significant number of sedentary and light duty jobs. However, "[t]hey just didn't want to accept Mr. Stoddard." It is difficult to answer Claimant's counsel's question: if Hagadone won't hire Claimant, who will? The only reasonable answer, especially after the employer contacts Claimant made, is no one.

Futility.

41. The Referee also finds that it would be futile for Claimant to continue searching for employment. The FCE performed by Taylor demonstrates Claimant cannot work more than a four-hour day and Claimant credibly testified that he needed to lay down frequently to relieve his pain. Defendants question the amount of effort given by Claimant in performing the various tasks involved in the FCE and are concerned that Claimant's pulse rate did not increase as he allegedly expended more effort. However, Taylor testified that that was to be expected in someone who moves as slow as Claimant does and limits himself due to pain. Taylor has no doubt that the FCE was valid for Claimant and that his subjective complaints of pain match her objective testing and observations. The Referee finds that the same can generally be said when matching Claimant's subjective complaints with all of the medical records. Further, the Referee's observations of Claimant during the course of the full-day hearing where he almost constantly changed positions reinforces Taylor's conclusions. Taylor and Brownell are completely neutral witnesses. Taylor has been a physical therapist at Kootenai Medical Center Physical Therapy Department for 16 years; the last 8 years in a management capacity. Brownell has been in the vocational field for the past 30 years with 25 of those in Coeur d'Alene. He has placed hundreds of workers in jobs in that area and is intimately familiar with its labor market.

FINDINGS, CONCLUSIONS, AND RECOMMENDATION - 26

The Referee places great weight on their testimony. With Claimant's restrictions, it would be futile for him to continue to seek employment.

42. Once an injured worker establishes a *prima facie* case of odd-lot status, the burden shifts to defendants to show that some kind of suitable work is regularly and continuously available.

[I]t is necessary that the [defendant] introduce evidence that there is an actual job within a reasonable distance from [claimant's] home which he is able to perform or for which he can be trained. In addition, the [defendant] must show that [claimant] has a reasonable opportunity to be employed at the job. It is of no significance that there is a job [claimant] is capable of performing if he would in fact not be considered for the job due to his injuries, lack of education, or other reasons. Carey v. Clearwater County Road Department, 107 Idaho 109, 112-113, 686 P.2d 54, 57-58 (1994); quoting Lyons v. Industrial Special Indemnity Fund, 98 Idaho 403, 406-407, 565 P.2d 1360, 1363-1364 (1997).

43. The Referee finds that Defendants have provided no evidence of any actual job that Claimant could perform on a regular and continuous basis. McKinney was not retained to find Claimant employment and Brownell could not do so. The Referee finds that Claimant is permanently and totally disabled.

Apportionment

This complicated case is rendered even more so in that Claimant was involved in three industrial accidents, two of which contribute to some extent to Claimant's overall total disability, and involving two sureties. He was also involved in an MVA for which he has been compensated in an arbitration proceeding and which has also contributed to some extent to his overall disability. General argues that most, if not all, of Claimant's disability, if any be found, should rest with Royal. Royal argues that there is no disability resulting from Claimant's last accident for which they are responsible. Claimant does not particularly care about

apportionment, arguing that if Claimant is found to be permanently and totally disabled both sureties are responsible.

Amended - P. 4. Recon -

44. The Idaho Supreme Court has held that the Commission may make apportionment determinations in both total and less than total disability cases so long as the rationale used is sufficiently explained to enable the Court to determine whether or not the apportionment is supported by substantial and competent evidence. See, Weygint v. J.R. Simplot Company, 123 Idaho 200, 846 P.2d 202 (1993); Edwards v. Harold L. Harris Construction, 124 Idaho 59, 856 P.2d 96 (1993). While the *Carey* formula may be used in cases in which the Industrial Special Indemnity Fund is not a party, it is not to be used in a mechanical fashion without the underlying rationale for its use being provided. Here, the Referee specifically finds that the use of the *Carey* formula will not provide for a fair and equitable apportionment, and, consequently, is not being utilized. Instead, an apportionment will be based on the relative percentages of PPD between General and Royal; that is, General is liable for 20% and Royal is liable for 60% of Claimant's permanent and total disability award.

Attorney's fees

Claimant seeks an award of attorney's fees against Royal for ceasing to pay for his physical therapy and certain of Dr. Shanks' bills and for terminating his TTD benefits. Idaho Code § 72-804 provides for an award of attorney's fees if the Commission determines that the employer or its surety contested a claim without reasonable grounds or that the employer or its surety neglected or refused to pay, after receiving written claim for compensation, the compensation provided by law within a reasonable time after receipt of the written notice.

Attorney's fees are not granted as a matter of right but may be recovered only under circumstances set forth in Idaho Code § 72-804. The decision that grounds exist for awarding

FINDINGS, CONCLUSIONS, AND RECOMMENDATION - 28

attorney's fees is a factual determination that rests with the Commission. Troutner v. Traffic Control Company, 97 Idaho 525, 528, 547 P.2d 1130, 1131 (1976).

45. As found in Findings of Facts numbers 14-15, Dr. Adams did not indicate in his report relied upon by Royal that physical therapy or the use of a treadmill was unreasonable, contraindicated, or should be stopped. The Referee finds that Royal had no reasonable basis for doing so and awards Claimant his attorney's fees for Royal's actions in that regard.

CONCLUSIONS OF LAW

1. Royal is liable for the costs associated with Claimant's physical therapy and Dr. Shanks' fees. They are also liable for continued physical therapy and/or the use of a treadmill should Claimant's treating physician deem it medically necessary. The Referee is unable to determine from the record the monetary amount of those benefits. The affected parties are encouraged to agree upon an amount reflective of this award.

2. Claimant is entitled to additional TTD benefits from Royal for the period of December 6, 1999, through April 30, 2000. This equates to an award of \$6,707.66.

3. *amended - see p. 4-5 Record*
Claimant is entitled to PPI benefits of ten percent of the whole person from General for Claimant's May 5, 1996, accident and injury. This equates to an award of \$11,412.50. General is given credit for PPI benefits previously paid.

4. Claimant is entitled to PPI benefits of five percent of the whole person from Royal for Claimant's May 11, 1999, accident and injury. This equates to an award of \$6,270.00. Royal is given credit for PPI benefits previously paid.

amended - p. 5 Record
5. Claimant is permanently and totally disabled pursuant to the odd-lot doctrine. General is liable for 20% of those benefits. Royal is liable for 60% of those benefits.

6. Claimant is entitled to attorney's fees for Royal's unreasonable denial of physical therapy benefits and unpaid bills of Dr. Shanks.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusions of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue the appropriate final order.

DATED in Boise, Idaho, on 16th day of August, 2001.

INDUSTRIAL COMMISSION

Michael E. Powers

Michael E. Powers, Referee

ATTEST:

Carol J. Haight
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 7 day of September, 2001, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States mail upon:

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BOISE ID 83701-0829

cjh

Carol J. Haight

FINDINGS, CONCLUSIONS, AND RECOMMENDATION - 30

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT J. STODDARD,)
)
 Claimant,)
)
 v.)
)
 THE HAGADONE CORPORATION,)
 Employer,)
)
 and)
)
 GENERAL INSURANCE COMPANY)
 OF AMERICA,)
 Surety,)
)
 and)
)
 ROYAL INDEMNITY COMPANY,)
 Surety,)
 Defendants.)
)

**IC 96-018310
97-036904
99-016897**

ORDER

FILED

SEP - 7 2001

INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

ORDER - 1

1. Royal is liable for the costs associated with Claimant's physical therapy and Dr. Shanks' fees. They are also liable for continued physical therapy and/or the use of a treadmill should Claimant's treating physician deem it medically necessary.

2. Claimant is entitled to additional TTD benefits from Royal for the period of December 6, 1999, through April 30, 2000. This equates to an award of \$6,707.66.

Awarded - P.S. Bacon
3. Claimant is entitled to PPI benefits of ten percent of the whole person from General for Claimant's May 5, 1996, accident and injury. This equates to an award of \$11,412.50. General is given credit for PPI benefits previously paid.

4. Claimant is entitled to PPI benefits of five percent of the whole person from Royal for Claimant's May 11, 1999, accident and injury. This equates to an award of \$6,270.00. Royal is given credit for PPI benefits previously paid.

Awarded - P.S. Bacon
5. Claimant is permanently and totally disabled pursuant to the odd-lot doctrine. General is liable for 20% of those benefits. Royal is liable for 60% of those benefits.

6. Claimant is entitled to attorney's fees for Royal's unreasonable denial of physical therapy benefits and unpaid bills of Dr. Shanks. Unless the parties can agree on an amount of reasonable attorney's fees, Claimant's counsel shall, within 21 days of the Commission decision, file with the Commission a memorandum of attorney's fees incurred in counsel's representation of Claimant, and an affidavit in support thereof.

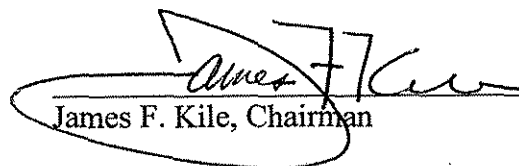
The memorandum and affidavit shall be submitted for the purpose of assisting the Commission in discharging its responsibility in determining reasonable attorney's fees in this case. In determining reasonable attorney's fees, the Commission may utilize the factors outlined in Clark v. Sage, 102 Idaho 261, 629 P.2d 657 (1981) and Hogaboom v. Economy Mattress, 107 Idaho 13, 684 P.2d 990, or any other relevant factors. Within 14 days of the filing of the

memorandum and affidavit in support thereof, Defendants may file a memorandum in response to Claimant's memorandum. If Defendants object to the time expended or the hourly charge claimed or any other representation made by Claimant's counsel, the objection must be set forth with particularity. Within 7 days after Defendants file their memorandum in response, Claimant's counsel may file a reply memorandum. The Commission, upon receipt of the foregoing pleadings, will review the matter and issue an order determining reasonable attorney's fees.

6. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED in Boise, Idaho, on this 7 day of September, 2001.

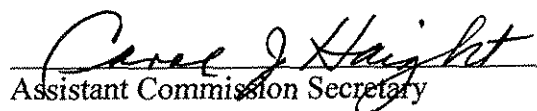
INDUSTRIAL COMMISSION


James F. Kile, Chairman


R. D. Maynard, Commissioner


Thomas E. Limbaugh, Commissioner

ATTEST:


Assistant Commission Secretary

ORDER - 3

CERTIFICATE OF SERVICE

I hereby certify that on the 7 day of September, 2001, a true and correct copy of **ORDER** was served by regular United States mail upon:

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cjh

Carol J. Haight

ORDER - 4

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ISB #3375

Attorneys for Claimant

BEFORE THE INDUSTRIAL COMMISSION, STATE OF IDAHO

ROBERT STODDARD,

Claimant,

v.

HAGADONE CORPORATION

Employer,

and

GENERAL INSURANCE COMPANY
OF AMERICA,

Surety,

and

ROYAL INDEMNITY COMPANY,

Surety.

Case No. I.C. No. 96-018310
I.C. No. 97-036904
I.C. No. 99-016897

CLAIMANT'S MEMORANDUM
OF ATTORNEY'S FEES

RECEIVED
INDUSTRIAL COMMISSION

2001 SEP 21 A 10:43

The Industrial Commission has ordered Claimant to provide a Memorandum of Attorney's Fees incurred in counsel's representation of Claimant, and an Affidavit in support thereof, so that the Commission can determine the amount of attorney's fees to be awarded against Royal Indemnity Company (Royal) pursuant to Idaho Code §72-804. September 7, 2001 Order, ¶6. Based on the 25% contingency fee agreement, attorney's fees should be awarded as applied to all amounts **presently owed and to be paid in the future** by Royal as a result of the Commission's September 7, 2001 Order.

Attorney's fees at 25% should be applied to all amounts **presently owed** and all amounts **to be paid in the future**, because had Royal not terminated Robert Stoddard's medical care with Dr. Shanks and his physical therapy and treadmill exercise with North Idaho Physical Therapy as prescribed by Dr. Shanks, Robert Stoddard would not be deconditioned, and there is a good chance he may still be working. The Commission specifically found that: "**Here, the treadmill may be said to have 'significantly improved' Claimant's condition...**"(Findings, Conclusions and Recommendations, p. 11, ¶ 15), and this was the basis for the Commission's award of attorney's fees under Idaho Code §72-804. *Id.* pp. 28-29, ¶ 45. Stated differently, Royal's unreasonable conduct of denying Dr. Shanks' treatment, physical therapy and the treadmill, which resulted in the award of attorney's fees by the Commission, is the same unreasonable conduct by Royal that, had it not occurred, could have rendered Mr. Stoddard capable of performing some sort of work. Paula Taylor testified that with low back injuries, the last thing you want to have occur is deconditioning, as that makes them worse. Taylor depo., p. 51, Ll. 1-4. The treadmill was the **only** activity Mr. Stoddard could do for exercise after the May 11, 1999 accident, since before that accident he could walk anywhere for exercise and after the accident the only thing he could do was use the treadmill which allowed him to keep his arms stationary and stabilize his back while he walked. Tr. p. 107, L. 21 - p. 109, L. 12; p. 206, Ll. 4-19. And since Mr. Stoddard suffers from depression which should be treated "immediately" according to the employer's panel physician, Dr. Sears, then the last thing you want to do to a person suffering from depression due to the industrial injury, is place upon them the added burden of scraping

together money for physical therapy, denying treadmill help, and jerking them off of TTD benefits. Royal chose to do just that. Royal made the conscious decision to deny Mr. Stoddard the opportunity to get better, or at least stabilize his low back and try to control his pain. Again, as specifically found by the Commission, "...the treadmill may be said to have 'significantly improved' Claimant's condition..." (Findings, Conclusions and Recommendations, p. 11, ¶ 15), and the Commission has specifically found Royal intentionally, wrongfully and unreasonably took that opportunity for significant improvement away from Mr. Stoddard. *Id.* pp. 28-29, ¶ 45.

The Commission must now decide what amount of attorney's fees are reasonable to punish and deter Royal for that unreasonable conduct. Attorney's fees should be awarded in significant amounts, to deter that conduct in the future. If the penalty exacted from Royal is small, there will be no deterrence, there will be absolutely no incentive for lawyers to accept such cases on behalf of claimants. *Hogaboom v. Economy Mattress*, 107 Idaho 13, 17, 684 P.2d 990 (1984) specifically addressed that issue.

The undersigned was involved in an Idaho Supreme Court case which shows that in order to serve the statutory purpose of Idaho Code §72-804, the award of attorney's fees **should extend to all amounts paid**. In *Kirpatrick v. Transtector Systems*, 114 Idaho 559, 563, 758 P.2d 713 (1988), the Industrial Commission awarded attorney fees in significant amounts, 25% of **all** benefits paid by the surety, after the complaint was filed.

Another case in which the undersigned was involved, as was the firm of which Royal's attorney is a member (Moffatt Thomas), is *Stigall v. J. D. Lumber, Inc., and Argonaut Northwest Ins. Co.*, I.C. No. 84-469890. In *Stigall*, the Commission ordered an award of "...attorney's fees equal to 25% of **all compensation paid or to be paid** pursuant to the Commission's award of September 7, 1989, **including 25% of all future compensation as such compensation becomes due.**" Award of Attorney Fees dated January 3, 1990, p. 4. (emphasis added). (copy attached). The reasoning by the Commission for awarding Mr. Stigall attorney fees in the amount of 25% of all present and future compensation, was as follows:

Defendants argue that any award of attorney fees must be proportionate to the amount implicated in the unreasonable conduct of the Surety, which involved

the failure to pay medical bills the amount of approximately \$1,800.00, according to Defendants' argument. This argument has merit and might be accepted by the Commission in many cases. However, in this particular case, we are persuaded by the argument by Claimant that had the Defendant Surety paid the medical bills when they were incurred and authorized the treatment which was recommended for the Claimant at that time, **the Claimant might be in a different physical condition today** and might not require the surgery which has now been recommended. We do not believe it is possible in this case to separate those medical bills which the Surety failed to pay and that treatment which the Surety failed to authorize from the rest of the case and reasonably allocate some attorney fees only to that portion of the benefits. As Claimant argues, **it was that conduct by the Surety which set in motion all that followed.** We believe it is reasonable to assume that the litigation would never have been necessary at all in this case had the Surety acted differently in 1985. While we do not intend to set a precedent for every case in which we decide to award attorney fees by the present decision, we believe it is appropriate to compensate Claimant by an award of the full amount of attorney fees he seeks.

* * *

We believe that the actual medical expenses which the Surety unreasonably refused to pay were financially insignificant, considering the ultimate benefits awarded in this case. Nevertheless, **they were certainly significant to the Claimant and we believe the Surety's conduct arguably contributed significantly to the present state of this case.** Attorneys should be encouraged to take on cases of this nature. We, therefore, believe that a substantial award of attorney fees is appropriate in this case for that reason also.

Id. pp. 2-3. (emphasis added). In the present case, where Dr. Shanks' unpaid bill amounted to \$509.13, and physical therapy bills amounted to only \$90, those amounts are significant to Mr. Stoddard, and it must be kept in mind that the reason these amounts were not larger is because Mr. Stoddard stopped treating with Dr. Shanks and stopped physical therapy because Royal unreasonably stopped paying for those benefits. The therapist let Mr. Stoddard use the treadmill for free for a while, then for \$15 a month, but after Mr. Stoddard stopped the treadmill therapy for a while, it was too painful to resume. Tr. p. 207, L. 20 - p. 211, L. 6; p. 239, L. 10 - 240, L. 6. Royal also stopped paying TTD benefits while at the same time Mr. Stoddard was not released for work by Dr. Shanks due to the May 11, 1999 injury. Tr. p. 214, L. 18 - p. 215, L. 1. With no TTD and no ability to work due to his May 11, 1990 injury, he was forced to live off savings, and

Mr. Stoddard could not afford to pay for Dr. Shanks' treatments, and was only able to pay \$90 for treadmill therapy out of his own pocket. Tr. p. 214, L. 18 - p. 215, L. 7; Affidavit of John T. Mitchell, Exhibit 2. After Royal cut him off, Mr. Stoddard was incurring the expense of job search as well. Tr. p. 21, Ll. 2-15. Forced to live off his savings, he later applied for early Social Security retirement. Tr. p. 219, Ll. 17-23. A treadmill would cost between \$2,000 and \$4,000. Tr. p. 272, Ll. 5-10. Just as in *Stigall*, Mr. Stoddard "**might be in a different physical condition today**" had Royal not unreasonably denied benefits, and the Commission in the present case **specifically so found** when it wrote: "**Here, the treadmill may be said to have 'significantly improved' Claimant's condition...**" Findings, Conclusions and Recommendations, p. 11, ¶ 15. That finding is consistent with Mr. Stoddard's testimony that continuing the treadmill would have "**helped me greatly**" to keep from being deconditioned and to halt his weight gain after the May 11, 1999 industrial accident. Tr. p. 238, L. 20 - p. 239, L. 9.

The very title of Idaho Code § 72-804 shows that attorney fees are **punitive**, they are **meant to punish and deter the surety from unreasonably denying benefits**. Larson on Workmen's Compensation Laws states that Idaho Code §72-804 is a "penalty-type" statute, allowing attorney fees against the employer/surety only when they engage in unreasonable conduct. 3 Larson on Workmen's Compensation Laws §83-12(b)(1), page 15-1278, n. 9, and p. 15-1279 (1989). An award of less than the amount requested will not teach Royal a lesson. The amount requested pales in comparison to the profits Royal must make every day.

As set forth above, *Stigall* and *Kirkpatrick* show why it is fair to award 25% of all past and future amounts awarded. The total amount of attorney fees on a 25% contingency basis is difficult to calculate, but can be very roughly approximated as follows. The Commission awarded TTD from the time benefits were cut off on December 6, 1999, through April 30, 2000, which the Commission has calculated being worth \$6,707.66. Order ¶ 2. 25% of that \$6,707.66 amount is \$1,676.91. The Commission has also awarded physical therapy bills and Dr. Shanks' bills be paid by Royal. Order, ¶ 1. These amount to \$90 and \$509.13, respectively, and total of \$599.13. Affidavit of John T. Mitchell, Exhibit 2. 25% of that \$599.13 amount is \$149.78.

The Commission has awarded 60% whole person PPD inclusive of PPI, against Royal as the result of the May 11, 1999 injury. Findings, Conclusions, and Recommendation, p. 18, ¶ 26; Order, ¶ 5. At the 2001 average weekly wage of \$495/week, 67% of that amount would be \$331.65/week for 300 weeks amounts to \$99,495.00. 25% of that \$99,495.00 amount would be \$24,873.75. But Royal's liability cannot be analyzed on a 300 week basis because Royal, as the surety for the last injury, is at the present time, responsible for 80% of monthly Total Permanent Disability payments (all of the monthly TPD payments except the 20% portion to be paid by General), since the ISIF is not a party to this action.¹

¹See *Bailey v. Wasankari Construction*, I.C. No. 89-664166, 92 IWCD 5179, 1992 IIC 8015 (July 28, 1992), Richardson, Betty, dissenting, writing:

Were we to apportion liability [which they didn't because the ISIF was not liable], the employer would not have to bear the full burden of Claimant's disability. However, since the majority has found Claimant totally and permanently disabled, in part because of a nonmanifest preexisting condition, **the employer must assume all liability**. This is so because liability cannot be apportioned between the employer and the ISIF pursuant to Idaho Code, Section 72-332, unless the preexisting condition is manifest and a hindrance or obstacle to employment. (bold added)

See also *Horton v. Garrett Freightlines, Inc.*, 115 Idaho 912, 952 (1989), Bistline, J. dissenting and quoting from *Royce v. Southwest Pipe of Idaho*, 103 Idaho 290, 647 P.2d 746 (1982):

The Commission applied the subjective test, which was rejected in *Gugelman* and *Curtis*, in its determination that Royce did not have a preexisting physical impairment. However, under *our holding*, the Commission did not err *since claimant's condition had not manifested itself prior to the January 20, 1972 accident, it was not a preexisting physical impairment within the meaning of I.C. §§ 72-332(2)*. Consequently, **the employer and its surety are liable for the full amount of Royce's disability benefits**. *Royce*, 103 Idaho at 294-95, 647 P.2d at 750. (bold added, italics in original).

See also, *Carey v. Clearwater Co. Road Dept.*, 107 Idaho 109, 116-117 (1984):

The parties in these three cases disagree on how liability for non-medical factors should be apportioned. The fund argues that, **because the employers are liable for the non-medical portion of disability where there is no pre-existing physical impairment to trigger the fund's liability**, the employers should likewise pay the non-medical portion where there is a pre-existing physical

It is not likely Royal would succeed against the ISIF², but until Royal first decides to bring in the ISIF and then subsequently succeeds in having the ISIF adjudicated as being liable, Royal is responsible for 80% of the monthly total permanent disability payment. This is likely to amount to significantly more than \$99,495.00.

It is simpler to award attorney's fees in the amount of 25% of all amounts Royal must pay, rather than establish a set amount today. That is the fair thing to do. That is the result required by *Kirpatrick v. Transtector Systems*, 114 Idaho 559, 563, 758 P.2d 713 (1988), and by *Stigall v. J. D. Lumber, Inc., and Argonaut Northwest Ins. Co.*, I.C. No. 84-469890.

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impairment. The employers, on the other hand, argue that the policy behind the establishment of the second fund, encouraging employers to hire handicapped workers, militates toward limiting the employers' liability to that percentage of disability directly caused by the accident.

We believe that the appropriate solution to the problem of apportioning the non-medical disability factors, in an odd-lot case **where the fund is involved**, is to prorate the non-medical portion of disability between the employer and the fund, in proportion to their respective percentages of responsibility for the physical impairment. (bold added).

²See *Bailey v. Wasankari Construction*, I.C. No. 89-664166, 92 IWCD 5179, 1992 IIC 8015 (July 28, 1992), where the majority held "Hence, the burden of proof is on Defendants Employer/Surety who moved to join the ISIF." The majority also discussed *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990), and noted that in *Dumaw*, "On remand from the Supreme Court, the Commission concluded that Dumaw's preexisting condition did not constitute a "hindrance or obstacle" to employment under the *Archer* test because Claimant **had no problems finding work for himself, being hired by other or actually working.**" 92 IWCD 5179, n. 4. (emphasis added). In the present case it is unknown how Royal would ever prove "hindrance of obstacle", as Mr. Stoddard never missed any work due to his 1997 automobile wreck, and was employed by defendant/employer Hagadone Corporation the remainder of 1997, all of 1998 and the first two days of 1999, at which time he had his May 11, 1999 injury for which Royal is responsible. Tr. p. 88, Ll. 3-19.

According to the September 7, 2001 Order, the Industrial Commission in the present case has ordered:

6. Claimant is entitled to attorney's fees for Royal's unreasonable denial of physical therapy benefits and unpaid bills of Dr. Shanks. Unless the parties can agree on an amount of reasonable attorney's fees, Claimant's counsel shall, within 21 days of the Commission decision, file with the Commission a memorandum of attorney's fees incurred in counsel's representation of Claimant, and an affidavit in support thereof.

The memorandum and affidavit shall be submitted for the purpose of assisting the Commission in discharging its responsibility in determining reasonable attorney's fees in this case. In determining reasonable attorney's fees, the Commission may utilize the factors outlined in Clark v. Sage, 102 Idaho 261, 629 P.2d 657 (1981) and Hogaboom v. Economy Mattress, 107 Idaho 13, 684 P.2d 990, or any other relevant factors.

Order, p. 2.

Claimant's attorney fee agreement with the undersigned is the standard (for the undersigned's practice) of 25% of all amounts recovered. Affidavit of John T. Mitchell, Exhibit

1. The contingency fee agreement used in the present case, is lower than the standard fee agreement approved by the Industrial Commission, *see* IDAPA 17, Title 02, Chapter 08, "Miscellaneous Provisions", "Disclosure Statement", which reads:

1. In workers' compensation matters, attorney's fees normally do not exceed twenty-five percent (25%) of the benefits your attorney obtains for you in a case in which no hearing on the merits has been completed. In a case in which a hearing on the merits has been completed, attorney's fees normally do not exceed thirty percent (30%) of the benefits your attorney obtains for you.

Hogaboom v. Economy Mattress, 107 Idaho 13, 684 P.2d 990 (1984), is not factually on point, as it dealt with an attorney fee agreement that provided for a 33 1/3% contingency fee of any amount recovered *or attorney fees awarded by the courts whichever is greater*, and the attorney requested attorney's fees based on an hourly rate. 107 Idaho 13, 14, 684 P.2d 990, 991. However, the Supreme Court in *Hogaboom*, stated that the agreement between the Claimant and

his counsel:

...though persuasive evidence, is not itself dispositive, but rather must be considered in conjunction with the factors cited in *Clark, supra*, 102 Idaho at 265-66, 629 P.2d 657, in order to determine whether the fee provided above is reasonable under all the circumstances. **At least in the presence of a clause such as that contained in the agreement at bar [the contingent fee unless attorney fees were awarded], we believe that the Commission must consider other factors as well.**

107 Idaho at 16, 684 P.2d at 993. (emphasis added). Since the attorney fee agreement in the present case does not have such a "clause" that allows the higher of the contingency agreement or the award of the Commission, the analysis under *Hogaboom* is very straightforward, the attorney fees under the present case should be analyzed pursuant to *Clark v. Sage*, 102 Idaho 261, 629 P.2d 657 (1981), which held:

In determining a reasonable attorney fee on a contingency basis, the Industrial Commission must therefore engage in a balancing process. By no means exhaustive, the following factors have been held to be relevant for consideration by the courts and/or administrative agencies in determining a reasonable fee on a contingency basis: (1) the anticipated time and labor required to perform the legal services properly; (2) the novelty and difficulty of the legal issues involved in this matter; (3) the fees customarily charged for similar legal services; (4) the possible total recovery if successful; (5) the time limitations imposed by the client or circumstances of the case; (6) the nature and length of the attorney-client relationship; (7) the experience, skill and reputation of the attorney; (8) the ability of the client to pay for the legal services to be rendered; and (9) the risk of no recovery.

102 Idaho 261, 265, 629 P.2d 657, 261. Each of these will be discussed below.

(1) The anticipated time and labor required to perform the legal services properly:

The minimum amount of time spent on the May 11, 1999 claim (the claim insured by Royal), is approximately 227.90 hours. Affidavit of John T. Mitchell, Exhibit 3. The actual amount of attorney's fees on an hourly basis is greater, as only documentable time was recorded. As an example, since the matter was handled on a contingency basis, very few phone calls were

documented, and only those with written documentation are set forth in the above calculation. There were certainly many phone conversations for which there were no time records. There were no time records since it is a contingency case. Please note that the time records do not include any time spent on the phone or writing to General Insurance Company or its attorney, Bentley Stromberg. On an hourly basis, attorney's fees amount to at least \$34,185.00. This is the amount of attorney's fees, based on the undersigned's hourly rate of \$150.00 per hour, times the number of hours worked (227.90 hours). Royal could argue that there were two sureties, and three injuries, so why should Royal be held accountable for 100% of the time claimant's counsel spent at hearing, in post-hearing depositions and in briefing? The simple answer to that question is: 1) Dr. Adams and Dan McKinney were Royal's witnesses, 2) Dr. Sears was General's witness, but rendered opinions essentially identical to Dr. Adams, 3) there is no way that General's two injuries rendered Claimant totally and permanently disabled, and the May 11, 1999 accident for which Royal is responsible, did render Claimant totally and permanently disabled, thus, it was the May 11, 1999 that caused the undersigned to try a Total Permanent Disability case, 4) it was the May 11, 1999 injury that necessitated Dr. Shanks' testimony, and 5) the May 11, 1999 injury causing the total and permanent claim is what caused Dan McKinney and Paula Taylor's depositions to be taken. The vast majority of the briefing was devoted to May 11, 1999 industrial injury, the ensuing issue of total and permanent disability, and the unreasonable denial of benefits by Royal.

(2) the novelty and difficulty of the legal issues involved in this matter: The termination of physical therapy and medical benefits was certainly a "difficult" legal and factual issue, since at all times Royal **refused** to do the right thing, ie., pay for the medical care Mr. Stoddard needed to try to help him get better. This aspect was more confusing than normal, because even Royal's own physician, Dr. Adams wasn't telling Royal to cut those benefits. Additionally, this is a total permanent disability case, and such cases are always difficult legally and factually. The legal issues of apportionment involved in this case were difficult. This case also obviously presented the complex legal issue regarding attorney fees.

(3) **the fees customarily charged for similar legal services:** The fees charged by the undersigned are consistent with what he charges for similar work, and the Commission is certainly aware that since this matter went to hearing, the fees charged by the undersigned are on the far low end of the scale in the State of Idaho. See Appendix I, "Disclosure Statement" by the Idaho Industrial Commission which reads:

1. In worker's compensation matters, attorney's fees normally do not exceed 25% of the benefits your attorney obtains for you in a case in which no hearing on the merits has been completed. In a case in which a hearing on the merits has been completed, attorney's fees normally do not exceed 30% of the benefits your attorney obtains for you.

(4) **the possible total recovery if successful:** Certainly in hindsight, total recovery was not only possible, it was in fact obtained, at least according to the Commission's decision (as of this date, Claimant has received no monies from either surety, Affidavit of John T. Mitchell). However, since the beginning of the claim, total recovery has never been a certainty. This is a complicated case, as the Commission has noted (Findings, Conclusions, and Recommendation, p. 27, ¶ 43-44), because "Claimant was involved in three industrial accidents, two of which contribute to some extent to Claimant's overall total disability, and involving two sureties." *Id.* The insurance panel doctors (Sears for General, Adams for Royal) both opined that Claimant had no impairment for his back from any cause. Findings, Conclusions, and Recommendations, p. 14, ¶ 20. Royal hired its own insurance doctor (Adams), its own vocational expert (McKinney), took both of their depositions. Most importantly, Royal clouded the medical evidence with its own behavior, which the Commission has specifically found to be unreasonable. By depriving Mr. Stoddard of medical treatment with Dr. Shanks and depriving him of physical therapy with Justin Kane, **Royal worsened Claimant's physical condition.** The Commission specifically found that fact when it wrote: "Here, the treadmill may be said to have 'significantly improved' Claimant's condition...". Findings, Conclusions and Recommendations, p. 11, ¶ 15. This was the basis for the Commission's award of attorney's fees under Idaho Code §72-804. *Id.* pp. 28-29, ¶ 45. Dr. Shanks pleaded with Royal to reinstate the physical therapy, pointing out to them

that Mr. Stoddard's symptoms have worsened since Royal cut Mr. Stoddard's therapy after Dr. Adams' insurance panel examination. Exhibit 20. The Commission noted this as it wrote: "After the costs associated with Claimant's treatment were terminated by Royal, Dr. Shanks wrote them a letter imploring them to resume payment for the [physical therapy] program." Findings, Conclusions, and Recommendation, p. 11, ¶ 15. The Commission found that the termination of physical therapy and medical benefits occurred during the period that Claimant was not medically stable. Findings, Conclusions, and Recommendation, p. 12, ¶ 16-17. Paula Taylor, the physical therapist referred by Dan Brownell, and whom the Commission specifically found credible, testified that the last thing you want to do with low back injuries, is to have the patient become deconditioned, as that makes them worse. Taylor depo., p. 51, Ll. 1-4. The Commission noted that Mr. Stoddard "...became further deconditioned after Royal ceased paying for his physical therapy and the use of the treadmill. Dr. Shanks corroborated Claimant's testimony in that regard." Findings, Conclusions, and Recommendation, p. 22, ¶ 31, n. 5. The Commission also noted that insurance panel doctor Sears and treating orthopedic surgeon Dr. Shanks believe Mr. Stoddard is suffering from depression to varying degrees, and that Mr. Stoddard agreed he was depressed mostly due to his inability to find work. Findings, Conclusions, and Recommendation, p. 23, ¶ 35, n. 6. The last thing you want to do to a person who is depressed, is cut off payment of the bills of the orthopedic surgeon who is trying to improve his condition, and to cut off the physical therapy that indeed was improving his physical condition (up until the time it was cut off). Even Dr. Adams, Royal's paid consultant, wrote that physical therapy was causing improvement of about 20% of the back pain for about a day and a half, and that the treatment of his muscles "significantly helps his lower back." Exhibit A, pp. 11-12.

(5) the time limitations imposed by the client or circumstances of the case: The undersigned required Mr. Stoddard to keep the undersigned informed of job search efforts. Affidavit of John T. Mitchell. This resulted in much periodical communication between Mr. Stoddard and the undersigned, which went undocumented due to the contingency fee agreement

between the undersigned and Mr. Stoddard. Throughout the undersigned's representation of Mr. Stoddard, it was clear that after his benefits were terminated by Royal, the supervision of the client, due to his depression, caused an increased amount of time to be spent with Mr. Stoddard, just to keep him encouraged. *Id.* The Commission noted Mr. Stoddard was depressed. Findings, Conclusions, and Recommendation, p. 23, ¶ 35, n. 6. Being angry at Royal caused much time to be spent counseling Mr. Stoddard and working with him through these difficult times. That counseling continues, as even though the decision has been rendered by the Commission, Mr. Stoddard has yet to see a dime from either insurance company. Affidavit of John T. Mitchell.

(6) the nature and length of the attorney-client relationship: The undersigned first began representing Mr. Stoddard on April 24, 1998 for his July, 1997 motor vehicle accident. The undersigned first began representing Mr. Stoddard on his 1996 and 1997 industrial accidents for which General is responsible on February 10, 1999. Affidavit of John T. Mitchell, Exhibit 4. The undersigned first began advising Mr. Stoddard on his May 11, 1999 industrial accident the day it occurred, however no formal attorney client relationship started until June 17, 1999. Affidavit of John T. Mitchell, Exhibit 1.

(7) the experience, skill and reputation of the attorney: The undersigned has been an attorney since September 1985, and has practiced extensively in worker's compensation matters since 1986 when he began practicing with Thomas A. Mitchell. Thomas Mitchell has been consulted on this case and assisted throughout. His experience exceeds 45 years as an attorney, much of it in the field of Worker's Compensation. Several Industrial Commission cases handled by the undersigned have made their way to the Idaho Supreme Court (*Davaz v. Priest River Glass Co., Inc./SIF* 125 Idaho 333, 870 P.2d 1292 (1994); *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990); *Dolph v. Hecla Mining Co.*, 119 Idaho 715, 810 P.2d 249 (1991); *Gooby v. Lake Shore Management Co./SIF*, 2001 Opinion No. 61, (June 27, 2001)). The undersigned has spoken to the Industrial Commission Rehabilitation Division about the subject of worker's compensation/Social Security Disability benefit offset. As to "reputation" the undersigned has applied for District Court positions four times, each time the undersigned has

not only made the "short list" submitted to the Governor of the State of Idaho, each time the undersigned has placed in the top half of all applicants in terms of rating by the other area attorneys from the Idaho bar, and this last time had a 95% approval rating. Affidavit of John T. Mitchell. The undersigned is comfortable with the Referee evaluating the experience, skill and reputation of both the undersigned, and Thomas A. Mitchell.

(8) the ability of the client to pay for the legal services to be rendered; The Claimant hasn't worked since the May 11, 1999 injury. He had no ability to pay for legal services other than on an hourly basis. This is true in nearly every worker's compensation case. The fact is that since the hernia surgery from the first of these industrial injuries, claimant has never been able to do the topiary and shrubbery work he did on the side with the knowledge of his employer Mr. Hagadone (Tr. p. 66, Ll. 5-16), and since the May 11, 1999 industrial accident, he has been completely unable to work. The record shows he is now single, that Mr. Stoddard went through a divorce during the first of these injuries, which effected his income. Tr. p. 32, Ll. 9-17. Royal stopped TTD benefits and he was not released for work by Dr. Shanks due to the May 11, 1999 injury. Tr. p. 214, L. 18 - p. 215, L. 1. With no TTD and no ability to work due to his May 11, 1990 injury, he was forced to live off savings. Tr. p. 214, L. 18 - p. 215, L. 7. After Royal cut him off, Mr. Stoddard was incurring the expense of job search as well. Tr. p. 21, Ll. 2-15. Forced to live off his savings, he later applied for early Social Security retirement. Tr. p. 219, Ll. 17-23.

(9) the risk of no recovery. Certainly both Royal and General insurance companies were arguing that there was no disability in excess of impairment. Specifically as to Royal, its insurance panel physician Dr. Adams felt that there was no impairment to Mr. Stoddard's back from any causes. Findings, Conclusions, and Recommendations, p. 14, ¶ 20. Thus, there certainly was a risk that Mr. Stoddard may have not received any medical impairment from the May 11, 1999 industrial accident, which would have resulted in no recovery for that injury. There was a risk that he could have been found to have not incurred any disability in excess of medical impairment, which would have resulted in no "new money" being available to claimant,

and thus, "no recovery" from which any attorney fee could have been taken.

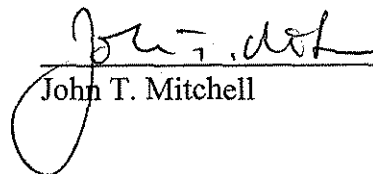
Hogaboom v. Economy Mattress, and *Clark v. Sage* focus on factors regarding whether the amount of the attorney fees are fair, but neither case really addresses the **fact** that under Idaho Code § 72-804, attorney fees are **punitive**, as that word is mentioned in the title of that statute. In other words, they are **meant to punish and deter the surety from unreasonably denying benefits**. Larson on Workmen's Compensation Laws states that Idaho Code §72-804 is a "penalty-type" statute, allowing attorney fees against the employer/surety only when they engage in unreasonable conduct. 3 Larson on Workmen's Compensation Laws §83-12(b)(1), page 15-1278, n. 9, and p. 15-1279 (1989). An award of less than the amount requested will not punish Royal, it will not serve to teach Royal a lesson on how to reasonably handle claims. Indeed, the amount asked for certainly pales in comparison to the profits Royal must make every day. Paula Taylor testified that with low back injuries, the last thing you want to do is have deconditioning, as that makes them worse. Taylor depo., p. 51, Ll. 1-4. And since Mr. Stoddard suffers from depression which should be treated "immediately" according to the employer's panel physician, Dr. Sears, then the last thing you want to do to a person suffering from depression due to the industrial injury, is place upon them the added burden of scraping together money for physical therapy, denying treadmill help, and jerking them off of TTD benefits. Royal Indemnity Company chose to do just that. Royal Indemnity Company made the conscious decision to deny Mr. Stoddard the opportunity to get better, or at least stabilize his low back and try to control his pain. Attorney's fees should be awarded in significant amounts, to deter that conduct in the future. If the penalty exacted from Royal is small, there will be no deterrence, there will be absolutely no incentive for lawyers to accept such cases on behalf of claimants. *Hogaboom v. Economy Mattress*, 107 Idaho 13, 17, 684 P.2d 990 (1984) specifically addresses this issue.

As mentioned above, *Kirpatrick v. Transtector Systems*, 114 Idaho 559, 563, 758 P.2d 713 (1988) is an Idaho Supreme Court case which shows that in order for attorney's fees awards under Idaho Code §72-804 to serve the statutory purpose, the award should extend to all amounts paid. In that case, the Industrial Commission awarded attorney fees in significant amounts, 25%

of **all** benefits paid by the surety, after the complaint was filed. *Stigall v. J. D. Lumber, Inc., and Argonaut Northwest Ins. Co.*, I.C. No. 84-469890 also shows that 25% of **all** amounts paid by Royal, and to be paid by Royal in the future, are warranted as attorney's fees.

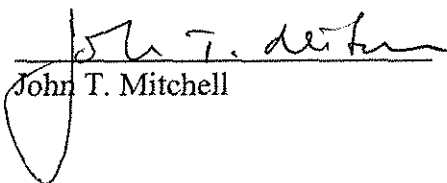
Idaho Code §72-804 is punitive in nature, and the adjuster and the surety must be punished for their conduct. There was **nothing** in Dr. Adams insurance panel report that allowed Royal to do what it did, cut off payments for Dr. Shanks and for physical therapy. The Commission has so found. Findings, Conclusions, and Recommendations, pp. 9-11, ¶ 14, 15; p. 29, ¶ 45. Attorney's fees under Idaho Code §72-804 must be awarded based on **all** benefits paid and ordered to be paid, from the time the Complaint was filed. To do otherwise means the surety's conduct and the conduct of this particular adjuster, not only go unchecked, but become encouraged in the future, as the Commission will have tacitly given its seal of approval to such conduct. This cannot be allowed.

Dated this 19th day of September, 2001.


John T. Mitchell

True copy mailed to:
Bentley Stromberg
P.O. Box 1510
Lewiston, ID 83501

Glenna Christensen
P.O. Box 829
Boise, ID 83701
this 19th day of September, 2001.


John T. Mitchell

BEFORE THE INDUSTRIAL COMMISSION
STATE OF IDAHO

EDDIE E. STIGALL,

Claimant,

vs.

J. D. LUMBER, INC.,

Employer,

and

ARGONAUT NORTHWEST INSURANCE
COMPANY,

Surety,

Defendants.

IC 84-469890

AWARD OF ATTORNEY FEES

FILED

JAN - 3 1990

INDUSTRIAL COMMISSION

The Commission entered its Decision in the above matter on September 7, 1989, and reaffirmed the Decision on reconsideration on November 16, 1989. One element of the Commission's Decision was an award of attorney fees to the Claimant to be determined subsequently upon submission of affidavit by Claimant and response by Defendants. The Commission has now received the Affidavit of Claimant regarding attorney fees and the response of the Defendants. In addition, the Commission has received a Memorandum of Defendant in opposition to Claimant's affidavit, a Memorandum in Support of Claimant's Affidavit from the Claimant, a Reply Memorandum of the Defendants, a response by the Claimant to

AWARD OF ATTORNEY FEES - 1

Defendants' Reply, and a Supplemental Reply from Defendants. The Commission is now fully apprised of the arguments of the parties with respect to an award of attorney fees.

The Claimant seeks an award of 25% of all compensation awarded the Claimant by the Commission in its Decision of September 7, 1989, including ongoing and future benefits which may be paid pursuant to that Decision. Defendants contend, however, that the unreasonable conduct of the Surety, which prompted the award of attorney fees, affected only a small portion of the benefits awarded and that attorney fees should only be awarded for the expenses incurred in connection with obtaining that portion of the award.

Defendants argue that any award of attorney fees must be proportionate to the amount implicated in the unreasonable conduct of the Surety, which involved the failure to pay medical bills in the amount of approximately \$1,800.00, according to Defendants' argument. This argument has merit and might be accepted by the Commission in many cases. However, in this particular case, we are persuaded by the argument by Claimant that had the Defendant Surety paid the medical bills when they were incurred and authorized the treatment which was recommended for the Claimant at that time, the Claimant might be in a different physical condition today and might not require the surgery which has now been recommended. We do not believe it is possible in this case to separate those medical bills which the Surety failed to pay and that treatment which the Surety failed to authorize from the rest of the case and reasonably

allocate some attorney fees only to that portion of the benefits. As Claimant argues, it was that conduct by the Surety which set in motion all that followed. We believe it is reasonable to assume that litigation would never have been necessary at all in this case had the Surety acted differently in 1985. While we do not intend to set a precedent for every case in which we decide to award attorney fees by the present decision, we believe it is appropriate to compensate Claimant by an award of the full amount of attorney fees he seeks.

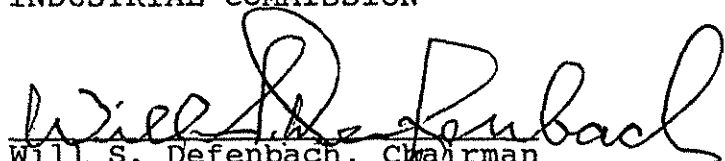
We conclude that the contingent fee agreement entered into between Claimant and his counsel for an award of 25% of all amounts recovered was a reasonable attorney fee, considering the standards set forth in Clark v. Sage, 102 Idaho 261. We have also considered the Supreme Court's holding in Hogaboom v. Economy Mattress, 107 Idaho 113, to the effect that an award of attorney fees should be sufficient to encourage attorneys to take on meritorious, yet financially insignificant, cases. We believe that the actual medical expenses which the Surety unreasonably refused to pay were financially insignificant, considering the ultimate benefits awarded in this case. Nevertheless, they were certainly significant to the Claimant and we believe the Surety's conduct arguably contributed significantly to the present state of this case. Attorneys should be encouraged to take on cases of this nature. We, therefore, believe that a substantial award of attorney fees is appropriate in this case for that reason also.

AWARD

IT IS HEREBY ORDERED and this does ORDER that Defendants pay to the Claimant attorney fees equal to 25% of all compensation paid or to be paid pursuant to the Commission's award of September 7, 1989, including 25% of all future compensation as such compensation becomes due.

DATED at Boise, Idaho, this 3 day of January, 1990.

INDUSTRIAL COMMISSION


Will S. Defenbach, Chairman


Gerald A. Geddes, Member


Larry C. Jackson, Member

ATTEST:


Assistant Secretary

Copies:

John T. Mitchell, Esq.
316 Elder Building
Coeur d'Alene, Idaho 83814-2778

Thomas V. Munson, Esq.
Moffatt, Thomas, Barrett, Rock & Fields
Post Office Box 829
Boise, Idaho 83701

AWARD OF ATTORNEY FEES - 4

JOHN T. MITCHELL
THOMAS A. MITCHELL
408 E. Sherman Avenue, Suite 316
Coeur d'Alene, ID 83814
Telephone: 208 664-8111
ISB #3375

Attorneys for Claimant

BEFORE THE INDUSTRIAL COMMISSION, STATE OF IDAHO

ROBERT STODDARD,

Claimant,

v.

HAGADONE CORPORATION

Employer,

and

GENERAL INSURANCE COMPANY
OF AMERICA,

Surety.

and

ROYAL INDEMNITY COMPANY,

Surety.

Case No. I.C. No. 96-018310
I.C. No. 97-036904
I.C. No. 99-016897

AFFIDAVIT OF
JOHN T. MITCHELL
IN SUPPORT OF CLAIMANT'S
AWARD OF ATTORNEY'S FEES

RECEIVED
INDUSTRIAL COMMISSION
2001 SEP 21 A 10:44

STATE OF IDAHO :
 :ss.
County of Kootenai :

John T. Mitchell, being first duly sworn upon oath, deposes and says:

That I am attorney for Claimant, Robert J. Stoddard, Claimant in each of the three industrial injuries which are the subject of this litigation.

That attached as Exhibit 2, are medical billings of Dr. William Shanks, showing unpaid medical bills and finance charges for services rendered after Royal Indemnity Company terminated payment of all benefits; also attached are billings from North Idaho Physical Therapy showing charges for use of the treadmill after Royal Indemnity Company terminated all benefits, and finally, attached are canceled checks and a carbonless copy of a check of a canceled check of Robert Stoddard, for payment of those physical therapy billings which involved continued use of the treadmill at the therapist, after Royal Indemnity Company terminated all benefits.

That attached as Exhibit 4 is a copy of my attorney fee agreement regarding the 1996 and 1997 industrial accident for which General Insurance Company is responsible.

That I began representing Mr. Stoddard on April 24, 1998, regarding his July, 1997 motor vehicle accident.

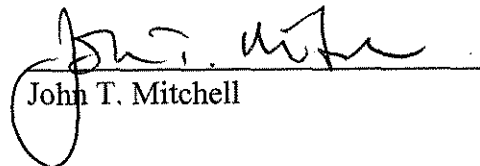
Mitchell. Thomas A. Mitchell has been consulted on this case and assisted throughout. His experience as an attorney exceeds 45 years, much of it in the field of workers compensation. I have spoken to the Industrial Commission Rehabilitation Division about the subject of Worker's Compensation/Social Security Disability benefit offset. I have applied for consideration for District Court positions four times, each time I have made the "short list" submitted to the Governor of the State of Idaho, and each time I have placed in the top half of all applicants in terms of rating by other area attorneys from the Idaho Bar, and the most recent time had a 95% approval rating.

That as of September 19, 2001, neither the undersigned nor Mr. Stoddard have received any additional amounts of money from either Royal Indemnity Company or General Insurance Co. of America.

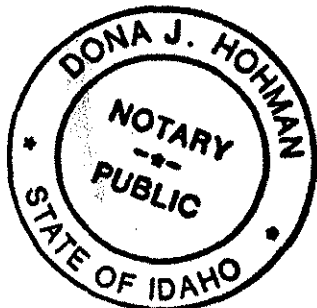
That I required Mr. Stoddard to keep me informed of job search efforts.

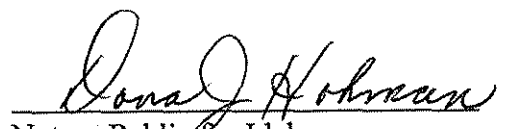
That after the May 11, 1999 injury, I frequently had to encourage and counsel Mr. Stoddard.

Dated this 19th day of September, 2001.


John T. Mitchell

Subscribed and sworn to before me this 19th day of September, 2001.

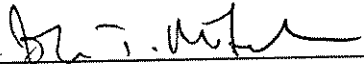



Notary Public for Idaho
residing at Coeur d'Alene Post Falls
Comm. expires: 8/26/2002

True copy mailed to:
Bentley Stromberg
P.O. Box 1510
Lewiston, ID 83501

Glenna Christensen
P.O. Box 829
Boise, ID 83701

this 19th day of September, 2001.



John T. Mitchell

THOMAS A. MITCHELL
JOHN T. MITCHELL
Attorneys At Law

408 E. Sherman Avenue, Suite 316
Coeur d'Alene, ID 83814-2778

Facsimile (208) 664-8113
E-Mail: jtmitchel@dmf.net

June 17, 1999

Bob Stoddard
880 Pearl
Hayden Lake, ID 83835

Dear Mr. Stoddard

I propose to handle your action against The Hagadone Corporation arising out of an industrial accident which occurred on May 11, 1999 upon the following basis:

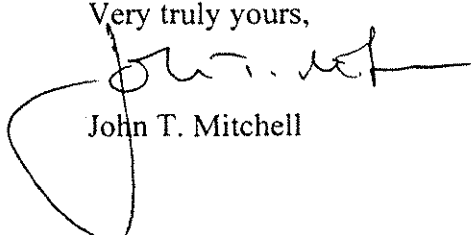
(1) My fee will be 25% of all amounts recovered. Any amount offered by way of settlement shall be submitted to you for your approval or disapproval.

(2) All costs such as depositions, medical exams and doctor reports are to be paid by you. Costs are due when billed. Typically, our office bills on or just before the first of every month. If the costs are paid and received at our office on or before the 25th of the month following the bill, there is no interest charge. There will be a 12% per year interest charge, computed at the rate of 1% per month, on any outstanding balance. That interest charge will be reflected on the following month's statement.

It is the practice of this law firm to destroy files after ten years and unless we receive directions from you to the contrary within 30 days of the date of this letter we will assume that such is your desire.

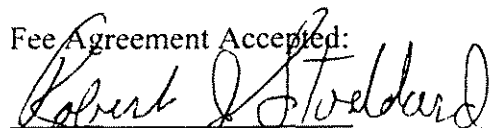
If the fee arrangement expressed above meets with your approval, please indicate by signing one copy of this letter in the place provided, returning that copy and retaining a copy for your files.

Very truly yours,


John T. Mitchell

JTM:cs

Fee Agreement Accepted:



Robert Stoddard

Dated: 6/17/99

ENCLOSURE **1** 91

NORTHWEST ORTHOPAEDIC SPECIALISTS P.S.

Sacred Heart Doctor's Bldg
105 W. Eighth Ave., Suite 6080
Spokane, WA 99204-2357
Phone (509) 624-2226
Fax (509) 624-9179

Valley Office
1414 N. Houk, Suite 102
Spokane, WA 99216-1047
Phone (509) 928-4334
Fax (509) 928-7893

Holy Family Office
235 E. Rowan, Suite 117
Spokane, WA 99207-1276
Phone (509) 484-5355
Fax (509) 483-6608

NorthPointe Office
9631 N. Nevada, Suite 304
Spokane, WA 99218-3604
Phone (509) 465-1300
Fax (509) 465-1313

Return this portion with your check.

BILL TO:

ROBERT J STODDARD
E 880 PEARL AVE
HAYDEN ID 83835

Amount Remitted: \$

Account Number: 147645

Statement Date: 08/22/01

Patient's Balance Due: \$509.13

Page: 1 of 1

PLEASE NOTE: If a "1" appears in this column, we have filed with your primary carrier. If a "2" appears, we have also filed with your secondary carrier. Our records show your insurance as follows:

DATE	PROVIDER	DIAG	REFERENCE	DESCRIPTION OF SERVICES	AMOUNT CHARGED	PAYMENTS / ADJ.	INSURANCE PENDING	YOUR BALANCE
08/22/01	3			PREVIOUS BALANCE				501.71
				FINANCE CHARGES	7.42			7.42
				MR STODDARD-PER GATES MCDONALD, YOU WERE DEEMED MEDICALLY STABLE ON 11-11-99. THE SERVICES ON THIS ACCOUNT WERE PROVIDED AFTER THAT DATE. THESE BILLS ARE YOUR RESPONSIBILITY. THANK YOU. DAWN				
				MR STODDARD, PER YOUR ATTORNEY JOHN MITCHELL. THIS BILL IS YOUR RESPONSIBILITY. THANK YOU FOR YOUR PROMPT PAYMENT. DAWN				
				PER PT, HAS 1 MORE BRIEFING TO FINISH UP CASE, SHOULD BE SETTLED IN A MONTH, WILL PAY THEN. DLS				

ACCOUNT BALANCE	(REFER TO PATIENT'S BALANCE DUE FOR AMOUNT TO PAY)	CURRENT BALANCE	OVER 30 DAYS	OVER 60 DAYS	OVER 90 DAYS	OVER 120 DAYS	PATIENTS BALANCE DUE
509.13		14.73	0.00	7.20	7.20	480.00	509.13

PROVIDERS 3 WILLIAM M SHANKS, M.D.	ACCOUNT NUMBER 147645	NAME ROBERT J STODDARD	TELEPHONE IF ANY QUESTIONS (509) 624-2226
	STATEMENT DATE 08/22/01	MAKE CHECK PAYABLE TO WILLIAM M SHANKS, M.D.	
	TAX I.D. # 91-1502837		

IF PAYING BY
☐ MASTERCARD OR
☐ VISA
 PLEASE COMPLETE

CARD NUMBER _____
 SIGNATURE _____

AMOUNT **92**
 EXP. DATE _____

EXHIBIT 2.0.1

Sep 14, 2001 12:59PM

NW ORTHOPAEDIC 509 624 9179

No.0978 P. 1/3

Fri Sep 14, 2001

11:12:16 am

NORTHWEST ORTHOPAEDIC SPECIALISTS

ACCOUNT ACTIVITY REPORT

(INQUIRY HARDCOPY)

Page: 1

147645 STODDARD, ROBERT J Office: 2 NORTHWEST ORTHOPAEDI Code1: Payclass: 4 PRIV INS
 B. 880 PEARL AVE. Doctor: 3 WILLIAM M SHANKS, M. Code2: Emp/Fax: HAGADONE CORP
 HAYDEN, ID 83835 Ref Dr: 999 NONE Birth: 03/16/36 Lawyer:
 (208) 762-3658 Diag: 1st Seen: 02/10/98 Stmt: YES (PAT)
 SS-No.: Misc. Date: Recall:

Date	OffDoc	Code	Diag#	ICD9	Diagnosis	Proc#	CPT	Procedure	Amount	Remain	SIRB
1. 02/10/98	2007	7	38	724.5	BACKACHE UNSPEC.	228	99212	LIM PROB/STRPWD DEC	36.00		YYP1
								03/14/98 PRIV INS PAYME - SAFECO	36.00		
2. 03/14/98		1004			CREDIT			PRIV INS PAYME - SAFE	36.00		Y
3. 03/24/98	1007	7	38	724.5	BACKACHE UNSPEC.	229	99213	EXP PROB/LOW COMP DEC	50.00		YYP1
								04/22/98 LABOR&IND OTHE - GENERA	50.00		
4. 04/22/98		1007			CREDIT			LABOR&IND OTHE - GENE	50.00		Y
5. 06/01/98	1007	7	38	724.5	BACKACHE UNSPEC.	196	99080	REPORTS/COPIES	37.38		NNP
								06/02/98 MED/LEGAL PAYMENT	37.38		
6. 06/02/98		1009			CREDIT			MED/LEGAL PAYMENT	37.38		Y
7. 06/03/99	1003	7	419	724.02	STENOSIS SPINAL,	224	99203	DETAIL EXAM/LOW COMPL	100.00		YYP1
								10/30/00 LABOR&IND OTHE - GATES	100.00		
8. 06/22/99	2003	7	419	724.02	STENOSIS SPINAL,	228	99212	LIM PROB/STRFWD DEC	40.00		YYP1
								10/02/99 LABOR&IND OTHE - GATES	40.00		
9. 07/13/99	2003	7	419	724.02	STENOSIS SPINAL,	228	99212	LIM PROB/STRFWD DEC	40.00		YYP1
								10/02/99 LABOR&IND OTHE - GATES	40.00		
10. 08/30/99	1007	7	419	724.02	STENOSIS SPINAL,	196	99080	REPORTS/COPIES	8.00		NNP
								08/30/99 MED/LEGAL PAYMENT	8.00		
11. 08/30/99		1009			CREDIT			MED/LEGAL PAYMENT	8.00		Y
12. 08/31/99	2003	7	1001	722.52	DEGENERATION LUMB	229	99213	EXP PROB/LOW COMP DEC	57.00		YYP1
								10/19/99 LABOR&IND OTHE - GATES	57.00		
13. 09/21/99	2003	7	1001	722.52	DEGENERATION LUMB	228	99212	LIM PROB/STRFWD DEC	43.00		YYP1
								10/26/99 LABOR&IND OTHE - GATES	43.00		
14. 10/02/99		1007			CREDIT			LABOR&IND OTHE - GATE	40.00		Y
15. 10/02/99		1007			CREDIT			LABOR&IND OTHE - GATE	40.00		Y
16. 10/06/99	1018	7	1001	722.52	DEGENERATION LUMB	234	99243	DET EXAM/LOW COMP DEC	140.00		YYP1
								11/15/99 LABOR&IND OTHE - GATES	140.00		
17. 10/19/99		1007			CREDIT			LABOR&IND OTHE - GATE	57.00		Y
18. 10/20/99	1007	7	1001	722.52	DEGENERATION LUMB	200	99075	DEPOSITION/COURT	500.00		NNP
								10/21/99 MED/LEGAL PAYMENT	500.00		
19. 10/21/99		1009			CREDIT			MED/LEGAL PAYMENT	500.00		Y
20. 10/26/99		1007			CREDIT			LABOR&IND OTHE - GATE	43.00		Y
21. 11/15/99		1007			CREDIT			LABOR&IND OTHE - GATE	140.00		Y
22. 11/16/99	2003	7	1001	722.52	DEGENERATION LUMB	228	99212	LIM PROB/STRPWD DEC	43.00		YYP1
								01/10/00 LABOR&IND OTHE - GATES	43.00		

93

EXHIBIT 2, p. 2

Sep. 14. 2001 12:59PM

NW ORTHOPAEDIC 509 624 9179

No.0978 P. 2/3

Fri Sep 14, 2001

11:12:16 am

NORTHWEST ORTHOPAEDIC SPECIALISTS

ACCOUNT ACTIVITY REPORT

(INQUIRY HARDCOPY)

Page: 2

147645 STODDARD, ROBERT J (continued)...

23.	11/23/99	1003	7	1001 722.52	DEGENERATION LUMB	196 99080	REPORTS/COPIES	47.40		NNP
						11/23/99	MED/LEGAL PAYMENT	47.40		
24.	11/23/99	1003	7	1001 722.52	DEGENERATION LUMB	1412 99080.1	SALES TAX	3.70		NNP
						11/23/99	MED/LEGAL PAYMENT	3.70		
25.	11/23/99	1009			CREDIT		MED/LEGAL PAYMENT	51.10		Y
26.	01/10/00	1007			CREDIT		LABOR&IND OTHE - GATE	43.00		Y
27.	01/10/00	3003	7	1001 722.52	DEGENERATION LUMB	229 99213	EXP PROB/LOW COMP DEC	57.00		YYP1
						06/17/00	LABOR&IND OTHE - GATES	57.00		
28.	01/28/00	1003	7	1001 722.52	DEGENERATION LUMB	228 99212	LIM PROB/STRFWD DEC	48.00	48.00	YY11
29.	03/03/00	1003	7	1001 722.52	DEGENERATION LUMB	228 99212	LIM PROB/STRFWD DEC	48.00	48.00	YY11
30.	04/07/00	1003	7	1001 722.52	DEGENERATION LUMB	228 99212	LIM PROB/STRFWD DEC	48.00	48.00	YY11
31.	05/05/00	1003	7	1001 722.52	DEGENERATION LUMB	228 99212	LIM PROB/STRFWD DEC	48.00	48.00	YY11
32.	06/02/00	1003	7	1001 722.52	DEGENERATION LUMB	228 99212	LIM PROB/STRFWD DEC	48.00	48.00	YY11
33.	06/17/00	1007			CREDIT		LABOR&IND OTHE - GATE	57.00		Y
34.	07/07/00	1003	7	510 789.0	PAIN ABDOMINAL	229 99213	EXP PROB/LOW COMP DEC	62.00	62.00	YY11
35.	07/07/00	1003	7	510 789.0	PAIN ABDOMINAL	144 72170	X-RAY PELVIS AP ONLY	55.00	55.00	YY11
36.	07/07/00	1003	7	510 789.0	PAIN ABDOMINAL	162 73510	X-RAY HIP COMPLETE 2	75.00	75.00	YY11
37.	09/01/00	1003	7	510 789.0	PAIN ABDOMINAL	228 99212	LIM PROB/STRFWD DEC	48.00	48.00	YY11
38.	09/18/00	2003	7	510 789.0	PAIN ABDOMINAL	196 99080	REPORTS/COPIES	36.17		NNP
						09/18/00	MED/LEGAL PAYMENT	36.17		
39.	09/18/00	2003	7	510 789.0	PAIN ABDOMINAL	1412 99080.1	SALES TAX	2.92		NNP
						09/18/00	MED/LEGAL PAYMENT	2.92		
40.	09/18/00	1009			CREDIT		MED/LEGAL PAYMENT	39.09		Y
41.	10/30/00	1007			CREDIT		LABOR&IND OTHE - GATE	100.00		Y
42.	11/09/00	1003	7		No diagnosis	196 99080	REPORTS/COPIES	10.00		NNP
						11/09/00	PUBLIC ASSIST - IDAHO D	10.00		
43.	11/09/00	1006			CREDIT		PUBLIC ASSIST - IDAHO	10.00		Y
44.	03/20/01	1003	7	510 789.0	PAIN ABDOMINAL	196 99080	REPORTS/COPIES	22.74		NNP
						03/20/01	PRIV INS PAYMENT	22.74		
45.	03/20/01	1003	7	510 789.0	PAIN ABDOMINAL	1412 99080.1	SALES TAX	1.84		NNP
						03/20/01	PRIV INS PAYMENT	1.84		
46.	03/20/01	1004			CREDIT		PRIV INS PAYMENT	24.58		Y
47.	05/16/01	2003	4		No diagnosis	196 99080	REPORTS/COPIES	10.00		NNP
						05/16/01	PUBLIC ASSIST - IDAHO D	10.00		
48.	05/16/01	1006			CREDIT		PUBLIC ASSIST - IDAHO	10.00		Y
49.	05/23/01	2003	4		No diagnosis	1254	FINANCE CHARGES	7.20	7.20	YNP
50.	06/20/01	2003	4		No diagnosis	1254	FINANCE CHARGES	7.20	7.20	YNP
51.	07/25/01	2003	4		No diagnosis	1254	FINANCE CHARGES	7.31	7.31	YNP
52.	08/22/01	2003	4		No diagnosis	1254	FINANCE CHARGES	7.42	7.42	YNP

05/27/99 NX VO; X-RAYS HERE FROM KOOTENAI MED. CTR FOR APPT W/WMS ON
6-3-99 AT THE DTO. X-RAYS SENT TO DTO/MS

05/28/99 NX DTO: CT, MRI, & PLAIN FILMS OF LSPINE HERE FROM RMC TO WMS'
OUTSIDE FILE/AM

94

EX-1111 2, p. 3

Sep.14. 2001 1:00PM

NW ORTHOPAEDIC 509 624 9179

No.0978 P. 3/3

Fri Sep 14. 2001

11:12:15 am

NORTHWEST ORTHOPAEDIC SPECIALISTS

ACCOUNT ACTIVITY REPORT

(INQUIRY HANDCOPY)

Page: 3

147645 STODDARD, ROBERT J (continued)...

09/01/99 NK DTD, MRI LS AND CT UPPER EXT. HERE FROM KOOTENAI MED. CTR
TO DR. SHANKS DESK/MS (X2 SETS) 11-9-99 W/ET FOR IME/AM
04/23/01 NK DOT SCOTT NO LONGER THERE-MARY CRONIN HANDLING CALLS-
1-888-934-8056. DLS LEFT MESSAGE FOR HER TO CALL. DLS
04/23/01 NK DEEMED MEDICALLY STABLE 11-11-99. PATIENT BILLS. DLS
05/15/01 SK MR STODDARD-PER GATES MCDONALD, YOU WERE DEEMED MEDICALLY
STABLE ON 11-11-99. THE SERVICES ON THIS ACCOUNT WERE
05/15/01 SK PROVIDED AFTER THAT DATE. THESE BILLS ARE YOUR RESPON-
SIBILITY. THANK YOU. DAWN
05/25/01 NK PER PATIENT-CLAIMS SHOULD BE BILLED TO ATTY JOHN MITCHELL.
06/19/01 SK MR STODDARD, PER YOUR ATTORNEY JOHN MITCHELL. THIS BILL IS
YOUR RESPONSIBILITY. THANK YOU FOR YOUR PROMPT PAYMENT. DAWN
06/22/01 SK PER PT, HAS 1 MORE BRIEFING TO FINISH UP CASE, SHOULD BE
SETTLED IN A MONTH, WILL PAY THEN. DLS

Date Time By Action
05/17/01 04:49PM admin1 ADDED TO SUBPOOL 17 INITIAL REVIEW POOL

Payclass: 4 PRIV INS

Relation: SELF

SUBSCRIBER#:

GROUP #:

Ins. Co.: 0

Subscriber: HAGADON CORP

Accept Assign: YES

Onset Date:

Deductible: 0.00

Claim #	Type	Sys Date	Clm Date	Amount	Remain	Pycl	Insurance
185722	NORM	02/19/98	02/10/98	36.00	0.00	7/2674	LABOR & IND. OTHER - GENERAL INSU
190103	NORM	04/01/98	03/24/98	50.00	0.00	7/2674	LABOR & IND. OTHER - GENERAL INSU
235320	NORM	06/17/99	06/03/99	100.00	100.00	7/3225	LABOR & IND. OTHER - GIESY, GREER
237123	NORM	07/01/99	06/22/99	40.00	0.00	7/3225	LABOR & IND. OTHER - GIESY, GREER
239681	NORM	07/23/99	07/13/99	40.00	0.00	7/3280	LABOR & IND. OTHER - GATES MCDONA
247674	NORM	09/16/99	08/31/99	57.00	0.00	7/3280	LABOR & IND. OTHER - GATES MCDONA
249405	NORM	09/30/99	09/21/99	43.00	0.00	7/3280	LABOR & IND. OTHER - GATES MCDONA
251093	NORM	10/14/99	10/06/99	140.00	0.00	7/3280	LABOR & IND. OTHER - GATES MCDONA
255911	NORM	11/24/99	11/16/99	43.00	0.00	7/3280	LABOR & IND. OTHER - GATES MCDONA
261501	NORM	01/20/00	01/10/00	57.00	0.00	7/3280	LABOR & IND. OTHER - GATES MCDONA
263774	NORM	02/10/00	01/28/00	48.00	48.00	7/3280	LABOR & IND. OTHER - GATES MCDONA
266825	NORM	03/09/00	03/03/00	48.00	48.00	7/3280	LABOR & IND. OTHER - GATES MCDONA
271610	NORM	04/20/00	04/07/00	48.00	48.00	7/3280	LABOR & IND. OTHER - GATES MCDONA
274799	NORM	05/18/00	05/05/00	48.00	48.00	7/3280	LABOR & IND. OTHER - GATES MCDONA
277872	NORM	06/15/00	06/02/00	48.00	48.00	7/3280	LABOR & IND. OTHER - GATES MCDONA
282379	NORM	07/20/00	07/07/00	192.00	192.00	7/3280	LABOR & IND. OTHER - GATES MCDONA
289445	NORM	09/21/00	09/01/00	48.00	48.00	7/3280	LABOR & IND. OTHER - GATES MCDONA

Balance	Current	Over-30	Over-60	Over-90	Over-120	YTD Charge	YTD Credit	Last Pay Amt	Last Pay Date
509.13	7.42	7.31	7.20	7.20	480.00	1671.90	1162.77	10.00	05/16/01

95

EXHIBIT 2, p.4

North Idaho Physical Therapy, Inc.
950 Ironwood Drive #5
Coeur d'Alene, ID 83814
(208)664-8194
ID # 82-0483060

ROBERT J STODDARD
E 880 PEARL AVENUE
HAYDEN, ID 83835

DATE : 09/11/2001
PATIENT : ROBERT J STODDARD
ACCOUNT : 48TQDRO
REFERRAL :
INJURED : / /
EMPLOYER :

PROVIDER : EXERCISE, HAYDEN

DIAGNOSIS 15.00 EXERCISE PROF RATE

DATE	DESCRIPTION	CHARGES	PAID	ADJUSTS	BALANCE
	BALANCE FORWARD	0.00	0.00	0.00	0.00
04/14/2001	0000000000 APRIL EXERCISE MEMBER DUES	15.00			15.00
04/14/2001	0000000000 MAY EXERCISE MEMBER DUES	15.00			30.00
04/14/2001	0000000000 JUNE EXERCISE MEMBER DUES	15.00			45.00
04/16/2001	ROA CHECK # 6086 THANK YOU		45.00		0.00
	TOTALS	45.00	45.00	0.00	
	ACCOUNT BALANCE				0.00

AGING: 0-30	31-60	61-90	91-120	OVER 120
0.00	0.00	0.00	0.00	0.00

A finance charge of 1.5% per month will be charged on all unpaid balances over 90 days

Attn:
John Mitchell, Attorney

North Idaho Physical Therapy, Inc.
 950 Ironwood Drive #5
 Coeur d'Alene, ID 83814
 (208) 664-8194
 ID # 82-0483060

ROBERT STODDARD
 880 E PEARL AVENUE
 HAYDEN, ID 83835
 (208) 762-3658

DATE : 09/11/2001
 PATIENT : ROBERT STODDARD
 ACCOUNT : 3STODRO
 REFERRAL : SELF
 INJURED : / /
 EMPLOYER : HAGADONE CORPORATION

DIAGNOSIS 846.0 SPRAINS/STRAIN LUMBOSACRAL

DATE	DESCRIPTION	CHARGES	PAID	ADJUSTS	BALANCE
11/08/2000 97799	MED EXER PRGRM 3 MONTH MEMBERSHIP	45.00			45.00
11/14/2000 ROA #6023	THANK YOU		15.00		30.00
11/14/2000 ROA #6024	THANK YOU		30.00		0.00
TOTALS		45.00	45.00	0.00	
ACCOUNT BALANCE					0.00

A finance charge of 1.5% per month will be charged on all unpaid balances over 90 days

Attn:
 John Mitchell, Attorney

CHECK HERE IF TAX DEDUCTIBLE ITEM ☐

ROBERT J. STODDARD
E 880 PEARL AVE 208-762-3658
HAYDEN, ID 83835

6086

4/9/01

Forty five and 00/100

Bank of America

Coeur d'Alene 27102 F
Idaho

Treadwell Express

For added security, the account number no longer appears on this copy.

BAL. FOR'D.	
THIS PAYMENT	45.00
BALANCE	
OTHER	
BAL. FOR'D.	

6086 NOT NEGOTIABLE

FIRST CHOICE™ 6024

ROBERT J. STODDARD
E 880 PEARL AVE 208-762-3658
HAYDEN, ID 83835

Date 11/8/2000 92-371/1231 27102

Pay to the Order of *North Idaho Physical Therapy* \$ 30.00

Thirty and 00/100 Dollars

Bank of America
Coeur d'Alene Office #27102 F
401 Front Avenue 1-800-442-6002
Coeur d'Alene, ID 83814

VALUED Customer Since 1996

Total 3 more \$45.00

Robert J. Stoddard

⑆123103716⑆ 80350 549⑈ 6024 ⑈0000003000⑈

FIRST CHOICE™ 6023

ROBERT J. STODDARD
E 880 PEARL AVE 208-762-3658
HAYDEN, ID 83835

Date 11/8/2000 92-371/1231 27102

Pay to the Order of *North Ida Physical Therapy* \$ 15.00

Fifteen and 00/100 Dollars

Bank of America
Coeur d'Alene Office #27102 F
401 Front Avenue 1-800-442-6002
Coeur d'Alene, ID 83814

VALUED Customer Since 1996

Robert J. Stoddard

⑆123103716⑆ 80350 549⑈ 6023 ⑈0000001500⑈

98

EXHIBIT 2, p. 7

To: Bob Stoddard

<u>Date</u>	<u>Services Rendered</u>	<u>Time Spent</u> (Hours)
5/19/99	Phone call from client RE: Colleen at Gieseey, Greer and Gunn	0.20
5/21/99	Review May 19, 1999 letter from Colleen MacKey at Gieseey, Greer and Gunn to Bob Stoddard	0.20
5/24/99	Letter from myself to Gieseey, Greer And Gunn RE: release of records	0.20
5/26/99	Phone call from client	0.10
6/3/99	Letter from myself to Colleen Sullivan of Gieseey, Greer and Gunn	0.20
	Letter from myself to Colleen Sullivan of Gieseey, Greer and Gunn, letter of representation	0.20
6/7/99	Review JSE from Dr. Shanks, submitted by Dan Brownell	0.20
6/9/99	Review June 8, 1999 letters from Gieseey, Greer and Gunn	0.20
	Phone call with Glenna Christensen	0.10
	Phone call to Colleen Sullivan at Gieseey, Greer and Gunn	0.10
	Phone call from Patty at Gieseey, Greer and Gunn	0.20
6/10/99	Letter to Colleen Sullivan, Gieseey, Greer and Gunn, adjusters For Royal	0.30
6/16/99	Review correspondence from Royal (and check) Insurance adjuster Gieseey, Greer and Gunn	0.20
6/23/99	Letter from myself to Christensen RE: continuation of benefits	0.20
	Letter to Dan Brownell RE: Dr. Shanks and Dr. West	0.30
	Medical records and release to be off work	0.20
6/25/99	Phone call from Christensen RE: benefits continuing	0.10
7/14/99	Letter from myself to Christensen and enclosures	0.20
8/4/99	Review "Notice of Claim Status" form prepared by Holly Alderman	0.10
8/5/99	Letter to Holly Alderman RE: Release of records	0.20

99

EXHIBIT 3

Page 2

<u>Date</u>	<u>Services Performed</u>	<u>Time</u>
9/21/99	Review records faxed by Dr. Shanks	0.50
9/29/99	Review "Notice of Claim Status"	
	Prepared by Holly Alderman	0.10
10/3/99	Review fax from William Shanks, M.D.	
	RE: release to be off work	
10/6/99	Review letter from Gates McDonald	
	RE: Dr. Lyons records	0.50
	Review letter from Gates McDonald	
	RE: Dr. Lea's records	0.20
	Review letter from Gates McDonald	
	RE: Dr. Penning's records	0.30
10/29/99	Review of October 28, 1999 letter from Holly Alderman to Michael Carraher, M.D. and enclosed records	1.00
	Letter from myself to Holly Alderman	0.30
	Research regarding tape recording of Medical examination	0.40
11/2/99	Review November 2, 1999 letter from Holly Alderman to myself	0.10
	Phone conversation with Holly Alderman	
	RE: cancellation of Dr. Carraher examination	0.10
11/3/99	Letter to Holly Alderman	
	RE: Dr. Adams' evaluation	0.20
11/9/99	Reviewed fax from Holly Alderman of Gates McDonald RE: Dr. Adams' Panel Evaluation, and Holly Alderman's November 9, 1999 letter to Dr. Adams	0.30
	Review November 4, 1999 letter of Holly Alderman of Gates McDonald to Dr. Adams	0.10
	Letter to Holly Alderman RE: Dr. Adams evaluation	0.20
1/20/00	Review January 19, 2000 letter of Holly Alderman at Gates McDonald	0.10
1/21/00	Phone call from client RE: status	0.20
	Left message with Dot Scott of Gates McDonald	0.10
1/25/00	Phone call from client	
	RE: status on treadmill	0.20
	Left message with Dot Scott of Gates McDonald	0.10
1/26/00	Phone call from Christensen	
	RE: denial of treadmill and other benefits	0.20
	Phone all with client RE: treadmill	0.50
3/29/00	Phone call from client	
	RE: status of case	0.30
4/20/00	Phone call from client	

100
EXHIBIT 3, p.2

Page 3

<u>Date</u>	<u>Services Performed</u>	<u>Time</u>
	RE: Hagadone doesn't want him back	0.30
5/10/00	Review Christensen's answer	0.20
	Review Christensen's Request for Mediation	0.20
	Review Christensen's Motion to Consolidate	0.40
5/11/00	Prepare Response Request for Mediation	0.50
	Prepare Objection to Consolidate	0.10
5/22/00	Review Order Granting Motion to Consolidate	0.20
6/5/00	Review Notice of Mediation	0.10
	Prepare Request for Calendaring	0.60
6/9/00	Review Christensen's Response to Request for Calendaring	0.10
7/9/00	Review discovery from Christensen	3.00
7/10/00	Review discovery from Christensen w/client	1.50
7/26/00	Review Notice of Hearing	0.10
9/19/00	Prepare Mediation memorandum	6.30
	Meet with to discuss mediation memorandum	1.30
9/20/00	Letter to Christensen	
	RE: Dr. Shanks' records	0.20
	Finish Mediation memorandum	3.20
9/25/00	Mediation and preparation	5.80
9/26/00	Prepare Affidavit and Motion to Vacate	0.50
	Prepare letter to Carol @ Ind. Comm.	0.20
9/30/00	Review Strombergs Response to Motion to Vacate	0.10
10/5/00	Review Christensen's Response to Motion to Vacate	0.10
10/10/00	Review Order Vacating - rescheduling	0.10
2/12/01	Letter to Christensen Requesting her to supplement discovery	0.30
	Telephonic prehearing conference	0.30
2/15/01	Telephone conference with Dr. Shanks	0.40
2/16/01	Review order vacating and rescheduling	0.10
2/22/01	Meet with Dr. Shanks and travel	3.80
2/23/01	Review 2/22/00 letter from Christensen	
	RE: discovery	
2/27/01	Dan Brownell deposition, my office	2.00
2/28/01	Dan McKinney meeting with Bob Stoddard my office	2.00
3/10/01	Review discovery from Christensen	2.40
3/13/01	Prepare with Bob Stoddard	4.90
	Prepare with Dan Brownell	2.10
	Prepare with Bob Stoddard	6.40
	Review Dan McKinney report from	

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EXHIBIT 3, p. 3

Page 4

<u>Date</u>	<u>Services Performed</u>	<u>Time</u>
	Christensen	0.20
3/14/01	Stoddard hearing and preparation	10.00
3/22/01	Review letter from Dr. Shanks, phone call to client	0.40
4/9/01	Prepare for Paula Taylor and Meeting with Paula Taylor	4.80
4/11/01	Prepare for Taylor, Sears and Shanks depositions	8.90
4/12/01	Deposition of Paula Taylor and Dr. Sears and travel	8.20
	Prepare for Shanks, Adams, & McKinney	6.80
4/13/01	Deposition of Dr. Shanks, Dr. Adams, Dan McKinney and travel	8.90
5/3/01	Letter to Industrial Commission RE: Taylor and Shanks depositions	0.10
5/11/01	Review Commission order on briefing schedule	0.10
	Review Christensen letter to Industrial Commission RE: post-hearing deposition	0.10
5/11-24/01	Prepare Claimant's Opening brief	61.00
	Read Royal's brief	2.40
6/29/01	Read General's brief	2.50
6/30-7/3/01	Claimant's Reply brief	41.00
9/10/01	Read decision	1.20
	Phone call to client (3) RE: decision	0.50
9/11/01	Prepare attorney fee memo	7.90
9/12/01	Finish attorney fee memo	3.20
	Telephone conference with Referee	0.20
		227.90

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EXHIBIT 3, p. 4

February 10, 1999

Robert Stoddard
880 E. Pearl
Hayden Lake, ID 83835

Dear Mr. Stoddard:

I propose to handle your claims against Hagadone Corporation arising out of an industrial accidents upon the following basis:

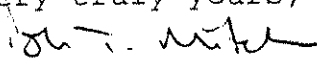
(1) My fee will be 25% of all amounts recovered. Any amount offered by way of settlement shall be submitted to you for your approval or disapproval.

(2) All costs such as depositions, medical exams and doctor reports are to be paid by you. Costs are due when billed. Typically, our office bills on or just before the first of every month. If the costs are paid and received at our office on or before the 25th of the month following the bill, there is no interest charge. There will be a 12% per year interest charge, computed at the rate of 1% per month, on any outstanding balance. That interest charge will be reflected on the following month's statement.

It is the practice of this law firm to destroy files after ten years and unless we receive directions from you to the contrary within 30 days of the date of this letter we will assume that such is your desire.

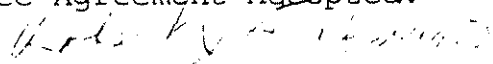
If the fee arrangement expressed above meets with your approval, please indicate by signing one copy of this letter in the place provided, returning that copy and retaining a copy for your files.

Very truly yours,


John T. Mitchell

JTM:cs

Fee Agreement Accepted:


Robert Stoddard

Dated: 2/11/99

EXHIBIT

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4

JOHN T. MITCHELL
THOMAS A. MITCHELL
408 E. Sherman Avenue, Suite 316
Coeur d'Alene, ID 83814
Telephone: 208 664-8111
ISB #3375

Attorneys for Claimant

BEFORE THE INDUSTRIAL COMMISSION, STATE OF IDAHO

ROBERT STODDARD,

Claimant,

v.

HAGADONE CORPORATION

Employer,

and

GENERAL INSURANCE COMPANY
OF AMERICA,

Surety,

and

ROYAL INDEMNITY COMPANY,

Surety.

Case No. I.C. No. 96-018310
I.C. No. 97-036904
I.C. No. 99-016897

CLAIMANT'S MOTION FOR
PAYMENT UNDER
IDAHO CODE §72-313,
ALTERNATIVE MOTION FOR
CLARIFICATION (RECONSIDERATION)
PURSUANT TO IDAHO CODE §72-718

RECEIVED
INDUSTRIAL COMMISSION
2001 SEP 24 A 10:51

I. CLAIMANT'S MOTION FOR ORDER OF PAYMENT UNDER I.C. §72-313

COMES NOW claimant, through his attorney John T. Mitchell, and pursuant to Idaho Code §72-313, moves the Commission to order immediate payment to Claimant of 100% of monthly total and permanent disability benefits dating back to May 1, 2000, by one or both of defendant sureties.

There appears to be confusion between the two sureties as to who is responsible for what parts of the total and permanent disability award. Thus, the only issue upon reconsideration is the issue of "liability" between "two or more employers or sureties". Under Idaho Code §72-313, the Commission "shall order payment of compensation to be made immediately by one or more of such employers or sureties". The Commission must order employer and its surety Royal Indemnity Company, or its surety General Insurance Company of America, or both, to pay 100% of all monthly total permanent disability benefits retroactive to May 1, 2000, to the current date, then 100% of all monthly total permanent disability benefits thereafter.

If this matter is appealed by either Royal or General, to the Idaho Supreme Court, the Commission should order that such benefits continue during the pendency of any such appeal, as the Commission has the power to do under Idaho Code §72-731.

This motion is made on the grounds set forth in the accompanying Claimant's Memorandum in Support of Motion for Order of Payment Under I.C. §72-313.

II. ALTERNATIVE MOTION FOR CLARIFICATION (RECONSIDERATION) PURSUANT TO IDAHO CODE §72-718.

COMES NOW claimant, through his attorney, and moves in the alternative, that if no parties have made a motion for clarification or for reconsideration pursuant to Idaho Code §72-718, within the 20 days allowed by said statute, Claimant now makes such motion, only if the Motion for Order of Payment Under I.C. §72-313 is denied (if that Motion for Order of Payment is Granted, it matters not to claimant who pays the total and permanent monthly benefits and in what proportionate amounts).

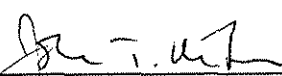
At the time of this motion, no parties have moved for reconsideration, yet, no parties have made any payments of any benefits under the September 7, 2001 Order of the Commission.

At the September 13, 2001 telephone conference with Referee Michael Powers, he indicated that he envisioned the monthly total and permanent disability benefits would be paid 20% by General, 60% by Royal, and indicated that the Claimant would have to "go somewhere else" for the remaining 20%, indicating that such 20% may be due from the ISIF, which was not made a party to this case.

The Claimant does not have the duty to bring in the ISIF. As long as the May 11, 1999 industrial accident caused some degree of medical impairment (5%, Order, ¶ 4) and disability (60% inclusive of the 5% medical impairment, Order, ¶ 4, 5), since it occurred **after** the July 24, 1997 motor vehicle accident and **after** any preexisting degenerative condition in claimant's spine, Royal is responsible for everything but General's 20% portion, unless Royal brings in the ISIF and until Royal makes a claim stick against the ISIF. Until that time, Royal is responsible for 80% of the monthly total permanent disability payments. If Royal fails in its case against the ISIF, Royal is responsible for 80% of the monthly total permanent disability payments for the remainder of Mr. Stoddard's life.

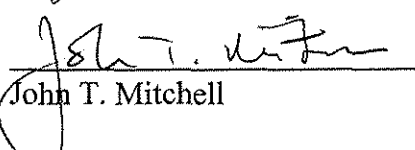
This Motion for Clarification/Reconsideration is supported by the authority cited in Claimant's Memorandum in Support of Motion for Order of Payment Under I.C. §72-313.

Dated this 21st day of September, 2001.


John T. Mitchell

True copy mailed to:
Bentley Stromberg
P.O. Box 1510
Lewiston, ID 83501
this 21st day of September, 2001.

Glenna Christensen
P.O. Box 829
Boise, ID 83701


John T. Mitchell

JOHN T. MITCHELL
THOMAS A. MITCHELL
408 E. Sherman Avenue, Suite 316
Coeur d'Alene, ID 83814
Telephone: 208 664-8111
ISB #3375

Attorneys for Claimant

BEFORE THE INDUSTRIAL COMMISSION, STATE OF IDAHO

ROBERT STODDARD,

Claimant,

v.

HAGADONE CORPORATION

Employer,

and

GENERAL INSURANCE COMPANY
OF AMERICA,

Surety,

and

ROYAL INDEMNITY COMPANY,

Surety.

Case No. I.C. No. 96-018310
I.C. No. 97-036904
I.C. No. 99-016897

CLAIMANT'S MEMORANDUM
IN SUPPORT OF
MOTION FOR PAYMENT
UNDER IDAHO CODE §72-313

2001 SEP 24 A 10:58
RECEIVED
INDUSTRIAL COMMISSION

I. MOTION FOR PAYMENT UNDER IDAHO CODE §72-313.

A. Idaho Code §72-313.

Either of the sureties may move to reconsider the Commission's decision and order of September 7, 2001, and Claimant has moved in the alternative to clarify that order on the apportionment issue. Until the apportionment issue is laid to rest, the Commission under Idaho Code §72-313 "shall order payment of compensation to be made immediately by one or more of such employers or sureties". Claimant is entitled to total and permanent disability benefits dating back to May 1, 2000, the day his TTD benefits ended according to the Commission's Order of September 7, 2001. Order, p. 2, ¶ 2, 5. The Commission must choose one or both of the defendant sureties, and order that 100% of those total and permanent disability benefit payments be made.

Idaho Code §72-313 reads:

Payment pending determination of policy coverage.--Whenever any claim is presented and the claimant's right to compensation is not in issue, but the issue of liability is raised as between an employer and a surety or between two (2) or more employers or sureties, the commission shall order payment of compensation to be made immediately by one or more of such employers or sureties. The commission may order any such employer or surety to deposit the amount of the award or to give such security thereof as may be deemed satisfactory. When the issue is finally resolved, an employer or surety held not liable shall be reimbursed for any such payments by the employer or surety held liable and any deposit or security so made shall be returned.

"The legislative purpose behind Idaho Code § 72-313 is to ensure that injured claimants receive immediate compensation whenever the employers or sureties involved contest liability between them." *Brooks v. Standard Fire Ins. Co.*, 117 Idaho 1066, 1071, 793, P.2d 1238 (1990). The legislature intended the act to give the injured worker "a speedy, summary, and simple remedy for the recovery of compensation for injuries sustained in industrial accidents." *Hit v. Hulhenak Building Contractor*, 96 Idaho 70, 72, 524 P.2d 531 (1974).

Since the inception of Idaho's Workers' Compensation Act, Industrial Commission Proceedings have been informal and designed for simplicity; the

primary purpose of these proceedings being the attainment of justice in each individual case. [citations omitted] Thus, Industrial Commission proceedings are conducted "as far as possible in accordance with the rules of equity." Idaho Code §72-408. Consistent with these policies, the Commission has historically been imbued with certain powers that specifically enable it to simplify proceedings and enhance the likelihood of equitable and just results.

Hagler v. Micron Technology, Inc., 118 Idaho 596, 599, 798 P.2d 55, 58 (1990).

In the present case, the Commission has decided that:

1) The fact that claimant is totally and permanently disabled pursuant to the odd-lot doctrine. Order, ¶ 5.

2) The fact that claimant sustained some medical impairment from his first (May 5, 1996 hernia), and third (May 11, 1999 low back and exacerbation of hernia) of his three pending work injuries for this same employer. Order, ¶ 3, 4.

3) The fact that April 30, 2000 was the date for which his TTD benefits extended, and thereafter was the date claimant became totally and permanently disabled. Order, ¶ 2-5.

The legal effect of these three findings of fact and conclusions of law is that "claimant's right to compensation is not in issue" under Idaho Code §72-313. The only issue upon claimant's motion for reconsideration is the issue of "liability" between "two or more employers or sureties". Thus, under Idaho Code §72-313, the Commission "shall order payment of compensation to be made immediately by one or more of such employers or sureties". The statute says "shall", there is no alternative for the Commission but to enter such an order. The legislative purpose behind Idaho Code §72-313 is to ensure that the injured claimant receives immediate compensation whenever the employers or sureties involved contest liability between them. *Brooks v. Standard Fire Ins. Co.*, 117 Idaho 1066, 793 P.2d 1238 (1990).

The Commission should order employer and its two sureties General and Royal, to pay total permanent disability benefits retroactive to May 1, 2000, to the current date, then monthly benefits thereafter. Once the issue of the exact amount of liability between the two sureties, and whether Royal decides to bring a claim against the ISIF, then, at that time the Commission may decide the "surety held not liable shall be reimbursed for any such payments by the employer or

surety held liable". It is simply a matter of accounting between the sureties at that time.

If this matter is appealed by General or Royal to the Idaho Supreme Court, the Commission should order that such benefits continue during the pendency of any such appeal, as the Commission has the power to do under Idaho Code §72-731.

**B. 100% of Total Permanent Disability Benefits Must be Paid
by the Present Sureties.**

The Commission has awarded 60% whole person PPD inclusive of PPI, against Royal as the result of the May 11, 1999 industrial injury, and 20% whole person PPD inclusive of PPI against General for the May 5, 1996 industrial injury. Findings, Conclusions, and Recommendation, p. 18, ¶ 26; Order, ¶ 5. Those percentages obviously total 80%. Who pays the remaining 20% is not clear from the decision, but is clear under the law.

This cannot be analyzed that General would be responsible for 100 weeks (20% of 500 weeks) and Royal responsible for the next 300 weeks (60% of 500), and the ISIF (which is not a party) being responsible for the remainder.

Similarly, it cannot be analyzed that General is responsible for 20% and Royal for 60% of full monthly Total and Permanent Disability benefits, and the remaining 20% go unpaid until the ISIF is brought in.

What must happen, is that General is responsible for 20% and Royal is responsible for 80% of full monthly Total and Permanent Disability benefits from May 1, 2000 on. Royal is responsible for everything other than General's 20%, even though that amounts to 80%, and 80% is obviously more than the 60% disability assigned by the Commission. That result is mandated because Royal is the surety for the last industrial accident, and the last industrial accident occurred after any other intervening act, such as the July 24, 1997 motor vehicle accident. If Royal wants to bring in the ISIF and adjudicate that issue, Royal may do so. But until Royal brings in the ISIF and until Royal succeeds in making their claim stick against the ISIF, Royal is responsible for all (other than General's 20%) monthly benefits. At the present

time Royal, as the surety for the last injury, is at the present time, responsible for 80% of monthly Total Permanent Disability payments (all of the monthly TPD payments except the 20% portion to be paid by General), since the ISIF is not a party to this action.¹

¹See *Bailey v. Wasankari Construction*, I.C. No. 89-664166, 92 IWCD 5179, 1992 IIC 8015 (July 28, 1992), Richardson, Betty, dissenting, writing:

Were we to apportion liability [which they didn't because the ISIF was not liable], the employer would not have to bear the full burden of Claimant's disability. However, since the majority has found Claimant totally and permanently disabled, in part because of a nonmanifest preexisting condition, **the employer must assume all liability**. This is so because liability cannot be apportioned between the employer and the ISIF pursuant to Idaho Code, Section 72-332, unless the preexisting condition is manifest and a hindrance or obstacle to employment, (bold added)

See also *Horton v. Garrett Freightlines, Inc.*, 115 Idaho 912, 952 (1989), Bistline, J. dissenting and quoting from *Royce v. Southwest Pipe of Idaho*, 103 Idaho 290, 647 P.2d 746 (1982):

The Commission applied the subjective test, which was rejected in *Gugelman* and *Curtis*, in its determination that Royce did not have a preexisting physical impairment. However, under *our holding*, the Commission did not err *since claimant's condition had not manifested itself prior to the January 20, 1972 accident, it was not a preexisting physical impairment within the meaning of I.C. §§ 72-332(2)*. Consequently, **the employer and its surety are liable for the full amount of Royce's disability benefits**. *Royce*, 103 Idaho at 294-95, 647 P.2d at 750. (bold added, italics in original).

See also, *Carey v. Clearwater Co. Road Dept.*, 107 Idaho 109, 116-117 (1984):

The parties in these three cases disagree on how liability for non-medical factors should be apportioned. The fund argues that, **because the employers are liable for the non-medical portion of disability where there is no pre-existing physical impairment to trigger the fund's liability**, the employers should likewise pay the non-medical portion where there is a pre-existing physical impairment. The employers, on the other hand, argue that the policy behind the establishment of the second fund, encouraging employers to hire handicapped workers, militates toward limiting the employers' liability to that percentage of disability directly caused by the accident.

We believe that the appropriate solution to the problem of apportioning the non-medical disability factors, in an odd-lot case **where the fund is involved**, is to prorate the non-medical portion of disability between the employer and the fund, in proportion to their respective percentages of responsibility for the physical impairment. (bold added).

It is not likely Royal would succeed against the ISIF², but until Royal first decides to bring in the ISIF and then subsequently succeeds in having the ISIF adjudicated as being liable, Royal is responsible for 80% of the monthly total permanent disability payment.

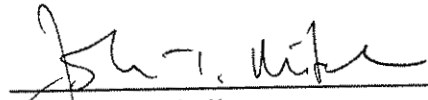
This is really no different than the situation where an employee who is injured at work, is adjudicated totally and permanently disabled, who had a preexisting condition that for some reason did not meet the prima facie elements to cause the ISIF to be liable. In that case, the employer/surety is responsible for all of the total and permanent disability benefits. The employer takes the employee as the employer finds the employee. It is only in situations less than total that you apportion and the employer/surety is not responsible for the preexisting condition. Idaho Code §72-406(1), compared to Idaho Code §72-332.

II. INTEREST ON AMOUNTS ALREADY DUE BUT NOT YET PAID

The Commission must award interest pursuant to Idaho Code §72-734 at rate of 10.125% for all amounts due after May 1, 2000 through June 30, 2000, at the rate of 11.25 % for all amounts due after July 1, 2000 through June 30, 2001 and at the current rate of 8.75% on all amounts due after July 1, 2001.

²See *Bailey v. Wasankari Construction*, I.C. No. 89-664166, 92 IWCD 5179, 1992 IIC 8015 (July 28, 1992), where the majority held "Hence, the burden of proof is on Defendants Employer/Surety who moved to join the ISIF." The majority also discussed *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990), and noted that in *Dumaw*, "On remand from the Supreme Court, the Commission concluded that Dumaw's preexisting condition did not constitute a "hindrance or obstacle" to employment under the *Archer* test because Claimant **had no problems finding work for himself, being hired by other or actually working.**" 92 IWCD 5179, n. 4. (emphasis added). In the present case it is unknown how Royal would ever prove "hindrance of obstacle", as Mr. Stoddard never missed any work due to his 1997 automobile wreck, and was employed by defendant/employer Hagadone Corporation the remainder of 1997, all of 1998 and the first two days of 1999, at which time he had his May 11, 1999 injury for which Royal is responsible. Tr. p. 88, Ll. 3-19.

Dated this 21st day of September, 2001

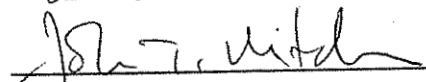


John T. Mitchell

True copy mailed to:
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this 21st day of September, 2001.



John T. Mitchell

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Attorneys for Defendants, The Hagadone
Corporation and Royal Indemnity Company

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT STODDARD,)
)
Claimant,)
)
vs.)
)
THE HAGADONE CORPORATION,)
)
Employer,)
)
and)
)
GENERAL INSURANCE COMPANY)
OF AMERICA,)
)
Surety,)
)
and)
)
ROYAL INDEMNITY COMPANY,)
)
Surety,)
Defendants.)
_____)

I. C. No. 99-016897
96-018310
97-036904

DEFENDANTS HAGADONE AND
ROYAL INDEMNITY'S RESPONSE
TO CLAIMANT'S MOTION FOR
PAYMENT UNDER IDAHO CODE
SECTION 72-313, ALTERNATIVE
MOTION FOR CLARIFICATION
(RECONSIDERATION) PURSUANT
TO IDAHO CODE SECTION 72-718

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COME NOW defendants, The Hagadone Corporation and Royal Indemnity Company, and in response to the claimant's motion pursuant to Section 72-313, advise the Industrial Commission that defendants agree that an order pursuant to said section is appropriate.

The Industrial Commission has issued its order finding the claimant 100% disabled and then directing General Insurance to pay 20% and Royal to pay 60%. It is obvious that the claimant is entitled to payment of 100% of his disability benefits. The failure of the referee and/or the Industrial Commission to adequately address that matter and assign benefits is one appropriately dealt with in a motion for reconsideration. These defendants have filed such a motion.

In the meantime, however, in order to assure that the claimant receives his benefits, defendants suggest that the appropriate order is one directing the parties to pay benefits to the claimant in accordance with the Industrial Commission order and then, as to the remaining 20%, a proportionate share thereof. In other words, the parties have been assigned liability of 80% of the disability. General is liable for 25% of the 80%, while the 60% assigned to Royal represents 75% of the amount awarded. Defendants propose that the Industrial Commission direct General to pay 25% of the permanent disability rate to the claimant and direct Royal to pay 75% of the permanent disability rate to the claimant, obligating both parties in proportion to the Industrial Commission award.

Defendants request further that the Industrial Commission make such an order and direct that following the Industrial Commission decision on reconsideration, reimbursement be made between the parties as appropriate.

DATED this 27 day of September, 2001.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Glenna Christensen
Glenna Christensen - Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27 day of September, 2001, I caused a true and correct copy of the foregoing **DEFENDANTS HAGADONE AND ROYAL INDEMNITY'S RESPONSE TO CLAIMANT'S MOTION FOR PAYMENT UNDER IDAHO CODE SECTION 72-313, ALTERNATIVE MOTION FOR CLARIFICATION (RECONSIDERATION) PURSUANT TO IDAHO CODE SECTION 72-718** to be served by the method indicated below, and addressed to the following:

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Fax: (208) 664-8111

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Attorneys for Defendants, The Hagadone
Corporation and Royal Indemnity Company

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT STODDARD,)
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 Claimant,)
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 THE HAGADONE CORPORATION,)
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 GENERAL INSURANCE COMPANY)
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 Surety,)
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 ROYAL INDEMNITY COMPANY,)
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 Surety,)
 Defendants.)
)

I. C. No. 99-016897
96-018310
97-036904

DEFENDANTS HAGADONE AND
ROYAL INDEMNITY'S MOTION
FOR RECONSIDERATION

2000 SEP 27 P 4:52
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COME NOW defendants, The Hagadone Corporation and Royal Indemnity Company,
and request that the Industrial Commission reconsider the decision issued herein on September 7,
2001, for the reason that the Industrial Commission committed reversible error by failing to make
findings regarding preexisting impairment and disability sufficient to allow appropriate
determination of the role of said prior factors in claimant's disability and for the reason that there
are insufficient findings for the Idaho Supreme Court to conduct review on appeal.

DATED this 27th day of September, 2001.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By Glenna Christensen
Glenna Christensen - Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of September, 2001, I caused a true and
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Defendants.)
_____)

I. C. No. 99-016897
96-018310
97-036904

DEFENDANTS HAGADONE AND
ROYAL INDEMNITY'S
MEMORANDUM IN SUPPORT OF
MOTION FOR RECONSIDERATION

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**RECONSIDERATION IS NECESSARY BECAUSE
THE INDUSTRIAL COMMISSION FAILED TO MAKE
ESSENTIAL FINDINGS**

On September 7, 2001, the Industrial Commission issued its order in this matter, having weighed reams of medical records, deposition testimony of three medical experts, the testimony of two vocational experts, a physical therapist, and the claimant. The purpose of the exercise was to determine whether the claimant was totally disabled and to make appropriate apportionment of liability among three work-related accidents.

The case was further complicated by the claimant's involvement in an automobile accident following his first industrial injury, but prior to the second two. As a consequence of the motor vehicle accident, the claimant suffered shoulder, neck, and low back injuries, and was assigned not only an impairment rating, but significant restrictions on his activity. Additionally, impairment ratings were given for a 1996 accident and, prior to the May 11, 1999, accident, a rating had been assigned for the claimant's back complaints.

In its decision, the Industrial Commission concluded that "claimant is permanently and totally disabled pursuant to the Odd-Lot Doctrine. General is liable for 20% of those benefits. Royal is liable for 60% of those benefits." Order of September 7, 2001, p. 2.

Accordingly, the claimant is 100% disabled, but disability is apportioned 20% and 60%. No reference is made to the missing 20% needed to equal 100%. Therein lies the basis for this request for reconsideration. Defendants do not challenge the finding that the claimant is totally, permanently disabled under the Odd-Lot Doctrine. Defendants believe, however, the Industrial Commission has committed reversible error by failing to make adequate findings regarding the

claimant's preexisting impairment/disability, of a non-work-related nature, to allow appropriate determination of apportionment for the entire disability.

By finding the claimant totally disabled, and assigning 20% disability to General and 60% to Royal, it must be inferred that an additional 20% of disability is due to other factors. The factors are not discussed or accounted for, nor is the impact on the claimant's disability considered.

THE DOCUMENTED DISABILITY FACTORS

The record reveals that as a consequence of the claimant's accident of May 5, 1996, and the resulting hernia, he received an impairment award of 10%. Order of September 7, 2001, p. 2, para. 3. The record further reveals that as a consequence of the hernia, the claimant was forced to abandon his topiary business, which provided a substantial part of his income, and was given a permanent 30-pound lifting restriction. Ex. 2, pp. 18-19; Tr., pp. 65-66.

As a consequence of his nonindustrial July 24, 1997, motor vehicle accident, the claimant experienced neck, left shoulder, and low back pain for which he was treated by Dr. West and by Dr. Graham French. Findings of Fact, September 7, 2001, p. 7. On April 12, 1999, Dr. French found the claimant's left shoulder to be stable and assigned a 20% whole person impairment rating and assigned permanent lifting restrictions of 25 pounds from waist height. Ex. 3, pp. 27-28. The claimant testified that he also experienced continual low back pain following the July 24, 1997, automobile accident. Tr., pp. 258-259. On April 12, 1999, Dr. French also assigned the claimant a 10% whole person impairment for his low back injury. Clmt's Ex. 3, medical records of Graham French, p. 3.

Dr. Shanks, who first saw the claimant a month after the May 1999 injury, eventually assigned the claimant a 10% impairment and apportioned it 5% to preexisting back disease and 5% to the 1999 back injury.

The Findings then recite that the claimant has incurred a 20% disability, inclusive of a 10% PPI associated with the May 5, 1996, injury. Finding No. 23, p. 16. In Finding No. 26, on page 18, the referee concludes that the claimant has incurred a 60% whole person PPD, inclusive of PPI resulting from the May 11, 1999, accident. The prior 5% impairment attributed to the low back by Dr. Shanks preexisting the May 1999 accident is not mentioned as a factor contributing to the claimant's disability, and no reference is made to the 20% whole person impairment assigned relative to the claimant's shoulder injury resulting from the motor vehicle accident, though the referee notes that injury from the motor vehicle accident "has also contributed to some extent to his overall disability." Order of September 7, 2001, Finding No. 43, p. 27.

Having made the determination that the claimant is totally disabled under the odd-lot theory, the referee apportions liability for the claimant's disability based on the relative percentages of PPD between the parties, that is, 20% for General and 60% for Royal. Nowhere is there an indication, however, as to the fate of the missing 20%.

In *Weygint v. J R Simplot Co.*, 123 Idaho 200, 846 P.2d 202 (1993), cited by the referee in his findings, the Idaho Supreme Court reversed and remanded a decision relative to the apportionment of nonmedical factors. The supreme court specifically said:

In making its apportionment determination, the Commission must provide a sufficient rationale for its decision so that the same is capable of being reviewed on appeal as to the support of that rationale by substantial competent evidence, and a determination as to whether that rationale is in accord with existing legal principles.

123 Idaho 200 at 204.

In that case, the Industrial Commission concluded that the claimant had a 60% disability and attributed only 10% to the industrial accident apportioning the balance to preexisting, nonindustrial impairment. The Industrial Commission apportioned the nonmedical factors in approximately the same proportion as the physical impairment. The court noted that the Industrial Commission gave no rationale nor basis for the apportionment. The court was unable to determine the basis for the apportionment made by the Industrial Commission from the findings and thus vacated that portion of the award dealing with the apportionment of disability caused by nonmedical factors.

In a second case, *Edwards v. Harold L. Harris Constr.*, 124 Idaho 59, 856 P.2d 96 (1993), the Idaho Supreme Court cited *Weygint* while again reversing an Industrial Commission decision because the Industrial Commission did not provide sufficient rationale or basis for the apportionment. In that case, the Industrial Commission stated:

The referee concludes that it is appropriate to apportion the disability caused by nonmedical factors in approximately the same proportion as is the disability due to permanent physical impairment.

Again, the court could not determine the basis for the apportionment based upon the Industrial Commission findings.

In this case, the Industrial Commission does not address the nonmedical factors, except to note that they do have an impact on the claimant's disability. The Industrial Commission also fails to account for either the 20% preexisting whole man impairment assigned to the left shoulder or the 5% preexisting back impairment. There is no finding as to the extent to which those preexisting, non-work-related factors affected the claimant's disability.

CONCLUSION

Defendants request the Industrial Commission to make specific findings regarding the prior impairments related to the motor vehicle accident and the degenerative disc disease and determine the effect of these preexisting impairments on claimant's disability prior to the May 1999 accident. Defendants further request that the Industrial Commission redetermine apportionment attributable to the May 1999 accident after making those findings.

Defendants request these findings to assure an appropriate record on appeal, if necessary, and to allow General and Royal to be bound by the findings in respect to any claim against the ISIF.

DATED this 27th day of September, 2001.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By *Glenna Christensen*
Glenna Christensen - Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of September, 2001, I caused a true and correct copy of the foregoing **DEFENDANTS HAGADONE AND ROYAL INDEMNITY'S MOTION FOR RECONSIDERATION** to be served by the method indicated below, and addressed to the following:

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Attorneys for Defendants

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT STODDARD,	)	I.C. Nos:	99-016897
	)		96-018310
Claimant,	)		97-036904
)		
vs.)		
)		
HAGADONE CORPORATION,)		
)		
Employer,	)	GENERAL'S MOTION FOR	
	)	RECONSIDERATION AND	
and	)	CLARIFICATION	
)		
GENERAL INSURANCE COMPANY)		
OF AMERICA,)		
)		
Surety,)		
)		
and)		
)		
ROYAL INDEMNITY COMPANY,)		
)		
Surety,)		
Defendants.)		

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GENERAL'S MOTION FOR
 RECONSIDERATION AND
 CLARIFICATION

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Attorneys for Defendants

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT STODDARD,)	I.C. Nos:	99-016897
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ROYAL INDEMNITY COMPANY,)		
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Defendants.)		

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GENERAL'S MOTION FOR
RECONSIDERATION AND
CLARIFICATION

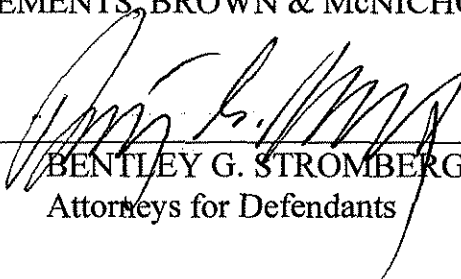
General Insurance Company, pursuant to Idaho Code § 72-718, moves for reconsideration of the Industrial Commission's Order that it is liable for 20% of claimant's total and permanent disability benefits.

General also moves for clarification of the Commission's Order regarding the offset to which it is entitled in the event reconsideration is denied.

This Motion is supported by the Memorandum in Support of Motion for Reconsideration and Clarification, filed herewith.

DATED this 27th day of September, 2001.

CLEMENTS, BROWN & McNICHOLS, P.A.

By  _____
BENTLEY G. STROMBERG
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of September, 2001, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT STODDARD,)	I.C. Nos:	99-016897
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Claimant,)		97-036904
)		
vs.)		
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HAGADONE CORPORATION,)		
)		
Employer,)	GENERAL'S MEMORANDUM	
)	IN SUPPORT OF MOTION	
and)	FOR RECONSIDERATION	
)	AND CLARIFICATION	
GENERAL INSURANCE COMPANY)		
OF AMERICA,)		
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Surety,)		
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and)		
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ROYAL INDEMNITY COMPANY,)		
)		
Surety,)		
Defendants.)		

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MEMORANDUM IN SUPPORT OF
 MOTION FOR RECONSIDERATION
 AND CLARIFICATION

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ROYAL INDEMNITY COMPANY,)		
)		
Surety,)		
Defendants.)		

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MEMORANDUM IN SUPPORT OF
MOTION FOR RECONSIDERATION
AND CLARIFICATION

I.

INTRODUCTION

Claimant suffered four injuries while employed by Hagadone:

1. A hernia on May 5, 1996;
2. Non-industrial automobile accident-related injuries on July 27, 1997;
3. An industrial low back injury on October 10, 1997; and
4. An industrial low back injury on May 11, 1999.

General was Hagadone's surety for the May 5, 1996 hernia and the October 10, 1997, low back injury. Royal was Hagadone's surety for the May 11, 1999 low back injury.

Claimant missed no work for Hagadone as a consequence of the May 5, 1996 hernia. He did, however, have two surgeries, and his physician assigned permanent lifting restrictions and a 10% PPI rating.

Claimant missed no work for Hagadone as a consequence of the July 1997 non-industrial auto accident. He did, however, sustain significant upper extremity and neck injuries which limited his ability to work in his "side" job as a tree-trimmer, and his physician assigned a 20% PPI rating.

Claimant missed no work as a consequence of the October 10, 1997 low back injury and his physician assigned a 0% PPI rating.

Claimant has been unable to work since his May 11, 1999, low back injury.

Claimant's physician assigned a 10% PPI rating, 5% of which was attributable to a pre-existing degenerative condition.

The Industrial Commission found that:

1. Claimant has a 10% PPI for the May 5, 1996 hernia;
2. Claimant has no PPI for the October 10, 1997, low back injury;
3. Claimant has a 10% PPI for the May 11, 1999, low back injury, 5% of which is pre-existing;
4. Claimant has a 10% disability in excess of his 10% impairment rating for the May 5, 1996, hernia;
5. Claimant has a 55% disability in excess of his 5% impairment rating for the May 11, 1999, low back injury;
6. Claimant is totally and permanently disabled under the odd-lot doctrine;
7. General is liable for 20%, and Royal is liable for 60%, of the total permanent disability award; and
8. General and Royal are entitled to credit for all sums previously paid for permanent impairment or disability.

General has filed a Motion for Reconsideration. General does not dispute the 10% PPI award or the 10% disability in excess award regarding the hernia the May 5, 1996 hernia. And, for purposes of this motion, General is not disputing the Commission's "odd

lot" finding. Instead, General disputes only the Commission's finding that it is liable for 20% of the total permanent disability award. As discussed below, General should be held liable only for the 10% disability in excess of the 10% impairment rating related to the hernia. (General paid the 10% hernia-related PPI rating long ago). General should not be liable for 20% of lifetime total permanent disability benefits.

General also seeks clarification of its payment obligation in the event the Commission denies reconsideration. The Commission found that General is entitled to credit for the 10% PPI award it has already paid. Given that finding, General seeks an order declaring that it is not required to begin paying 20% of the total permanent disability award until its credit for the 10% PPI impairment payment is exhausted – which should be in approximately July of 2003.

II.

ARGUMENT

A. General Cannot Be Held Liable For Any Portion Of The Total Permanent Disability Award.

As mentioned, the Commission found that claimant sustained a 10% PPI as a consequence of the hernia, along with a 10% disability in excess of that impairment. General does not dispute those findings.

The Commission, however, also found that General is liable for 20% of the total permanent disability award. That finding is inconsistent with the law.

The Workers Compensation Act authorizes apportionment of disability benefits in cases of disability less than total. Idaho Code § 72-406. The Act also authorizes apportionment in cases of total disability where the ISIF is a party. Idaho Code § 72-332. The Act, however, contains no provision authorizing apportionment between sureties in cases of total disability where the ISIF is not a party.

The Referee cited two cases in support of his conclusion that total permanent disability benefits may be apportioned between sureties in cases not involving the ISIF: Weygint v. J.R. Simplot Co., 123 Idaho 200, 846 P.2d 202 (1993), and Edwards v. Harold L. Harris Construction, 124 Idaho 59, 856 P.2d 96 (1993). However, neither of those cases were total permanent disability cases, and there is no language in either case supporting apportionment between sureties in total permanent disability cases.

Additionally, the law in Idaho is clear that a surety should not be held liable for disability caused by injuries occurring after the injury for which the surety is liable. In Horton v. Garrett Freightlines, Inc., 115 Idaho 912, 772 P.2d 119 (1989), the claimant suffered an industrial right hip injury and subsequently developed non-industrial shoulder and left hip injuries. The Idaho Supreme Court held that while the subsequent non-industrial injuries should be considered in determining the degree of the claimant's permanent disability, they should not be considered in determining the degree of the surety's liability because they were subsequent injuries which were not affected by the work-related injury.

The Court held that although the claimant was totally and permanently disabled by virtue of the combination of his work injury and the subsequent injuries, the surety could not be held liable for the total disability and was liable only for the disability caused by the work-related injury.

In this case, Claimant was not totally and permanently disabled due to the hernia alone. He did not miss any work due to the hernia; his doctor testified that he would still be working despite the hernia but for the May 11, 1999, low back injury; and the Commission found that claimant had sustained only a 20% disability as a consequence of the hernia. Rather, it was the July 27, 1997, auto accident-related injuries and the May 11, 1999, low back injury which rendered claimant totally and permanently disabled. Those injuries occurred subsequent to and independent of the May 5, 1996 hernia, and so under Horton, General cannot be held liable for the disability caused by them.

Indeed, in Blang v. Liberty Northwest Ins. Corp., 125 Idaho 275, 869 P.2d 1370 (1994), the Supreme Court stated:

Imposing the liability for the future disabilities suffered by an employee upon a surety which has long ceased to insure the employee's employer would be grossly unjust, would run counter to the rule stated in Peckham, 116 Idaho at 679, 778 P.2d at 801, and would undoubtedly discourage sureties from insuring particular employers.

125 Idaho at 278, 869 P.2d at 1373. In this case, it would be "grossly unjust" to, in effect, impose liability on General for disabilities which occurred after it stopped insuring

Hagadone.

That principle is further illustrated by Idaho Code § 72-332. Under that statute, where a work-related impairment and a pre-existing impairment contribute to a claimant's total permanent disability, the liability is to be apportioned between the last employer and surety and the ISIF. In that manner, the last employer and surety's liability is limited to the disability caused by the last injury. Thus, in this case, Royal can make a claim against the ISIF and probably drastically reduce its liability for the total permanent disability award. General, on the other hand may have no basis for a claim against the ISIF because all of the impairments arose after the May 5, 1996 hernia – i.e., there were no pre-existing impairments as regards General. The legislature clearly did not intend to protect the last surety from liability for pre-existing impairments while leaving prior sureties liable for subsequent, independent injuries, impairments and disabilities.

That conclusion is also supported by the Supreme Court and Commission decisions in Smith v. J.B. Parson & Co., 127 Idaho 937, 908 P.2d 1244 (1996). In Smith, the Supreme Court and Commission effectively held that the employer's liability for disability related to a finger injury was limited to the disability caused by that finger injury. The claimant was rendered totally and permanently disabled by the combination of the finger injury and subsequent injuries, but the employer and surety regarding the finger injury were liable only for the disability attributable to the finger injury and were not required to pay any

portion of the total permanent disability award.¹

In short, General's liability should be limited to the 20% disability attributable to the May 5, 1996, hernia, 10% of which – in the form of the 10% PPI rating – has already been paid.

B. If The Commission Does Not Reconsider Apportionment, The Commission Should Order That General Is Not Obligated To Begin Paying Its 20% Share Of The Total Permanent Disability Award Until Approximately July of 2003.

The Commission found that General is entitled to credit for all sums previously paid. There appears, however, to be a disagreement as to how that credit should be applied.

The Commission found claimant to be totally and permanently disabled, and the 10% impairment already paid by General is one portion of that total and permanent disability. Accordingly, if the Commission maintains that General is in fact liable for 20% of the total permanent disability award, then, given the credit for the 10% PPI award already paid, General's payment obligation should be determined as follows:

1. 10% PPI paid = \$11,412.50.
2. Date of total permanent disability is May 1, 2000.
3. 67% of 2000 AWW = \$315.37/week x 20% = \$63.11/week x 35 weeks = \$2,208.85.
4. 67% of 2001 AWW = \$331.65/week x 20% = \$63.33/week x 52 weeks = \$3,449.60.

¹See, Commission's Decision on remand, 1998 WL 261069, February 8, 1998.

5. $67\% \text{ of } 2002 \text{ AWW} = \$352.42/\text{week} \times 20\% = \$70.48/\text{week} \times 52 \text{ weeks} = \$3,664.96.$
6. $67\% \text{ of } 2003 \text{ AWW (estimated)} = \$370.04 \times 20\% = \$74.00/\text{week} \times 28 \text{ weeks} = \$2,089.53.$
7. $\$11,412.50(\text{paid}) - \$2,208.85(2000 \text{ } 20\% \text{ share}) - \$3,449.60(2001 \text{ } 20\% \text{ share}) - \$3,664.96(2002 \text{ } 20\% \text{ share}) - \$2,089.09(\text{estimated } 2003 \text{ } 20\% \text{ share for } 28 \text{ weeks}) = \$0.00.$

In short, it appears that the \$11,412.50 credit to which General is entitled will not be fully exhausted until approximately the 28th week of 2002. If the credit is applied in any other manner, claimant will receive a double recovery from General. He will be paid twice for the 10% impairment – once prior to the total permanent disability award and once as a component of General's 20% share of the total permanent disability award.

To further illustrate the point, Royal is not obligated to pay its 5% PPI award plus its share of the total permanent disability award. Royal is instead required to pay only its share of the total permanent disability award. Unless General is given credit in the manner outlined above, it will – in contrast to Royal – be required to pay its 10% PPI award plus its share of the total permanent disability award.

In short, the Commission should therefore enter an Order clarifying that General is not obligated to begin paying its 20% portion of the total permanent disability award until 2003 when the credit for the previous 10% PPI payment is completely exhausted – which should be approximately the 28th week of 2003.

RESPECTFULLY SUBMITTED this 27th day of September, 2001.

CLEMENTS, BROWN & McNICHOLS, P.A.

By


BENTLEY G. STROMBERG

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of September, 2001, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

John T. Mitchell
Attorney at Law
408 E. Sherman Avenue, Suite 316
Coeur d' Alene, ID 83814

Glenna Christensen
Moffatt, Thomas, Barrett, Rock &
Fields, Chartered
Post Office Box 829
Boise, ID 83701

☒ U.S. MAIL
☐ HAND DELIVERED
☐ OVERNIGHT MAIL
☒ TELECOPY (FAX)


Bentley G. Stromberg

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Facsimile: (208) 385-5384
14-400.224

Attorneys for Defendants, The Hagadone
Corporation and Royal Indemnity Company

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT STODDARD,)
)
Claimant,)
)
vs.)
)
THE HAGADONE CORPORATION,)
)
Employer,)
)
and)
)
GENERAL INSURANCE COMPANY)
OF AMERICA,)
)
Surety,)
)
and)
)
ROYAL INDEMNITY COMPANY,)
)
Surety,)
Defendants.)
_____)

I. C. No. 99-016897
96-018310
97-036904

**DEFENDANTS HAGADONE AND
ROYAL INDEMNITY'S RESPONSE
TO CLAIMANT'S MEMORANDUM
REGARDING ATTORNEY FEES**

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INDUSTRIAL COMMISSION

COME NOW defendants, The Hagadone Corporation and Royal Indemnity Company, and in response to the claimant's memorandum regarding attorney fees, advise the Industrial Commission as follows.

In its decision of September 7, 2001, the Industrial Commission awarded the claimant attorney fees for physical therapy and office visits to Dr. Shanks following the determination of Dr. Adams that the claimant had reached maximum medical improvement. The defendants have received from the claimant's attorney copies of Dr. Shanks' bills and have paid the outstanding balance of \$516.55. In addition, the claimant was reimbursed \$90 for amounts he had paid to North Idaho Physical Therapy, Inc. A total of \$606.55 was paid in accordance with the Industrial Commission order.

The claimant's attorney has submitted an affidavit and memorandum requesting an award of 25% of all amounts paid by Royal and to be paid by Royal in the future as attorney fees. The request is not based on those amounts which the Industrial Commission found defendants should have paid but instead on all amounts the defendants would ever owe without regard to the proportion to which the attorney's efforts were actually directed to recovery of the \$606.55.

In support of his request, the claimant's attorney alleges that had the treadmill been provided it could have "significantly improved" claimant's condition. In fact, it is quite clear from the record that despite months of physical therapy and use of the treadmill, the claimant did not improve and was not able to return to work. There is no indication in Dr. Shanks' deposition that he believed the claimant ever would be able to return to work. The physical therapy, which the claimant had, did not do any good in and of itself, according to Dr. Shanks' records. It simply

allowed the claimant to walk on the treadmill, as opposed to merely walking, which provided some relief to the claimant.

The issues in this case included impairment, disability in excess of impairment, and whether or not the claimant was totally and permanently disabled. The issue as to the claimant's entitlement to payment for Dr. Shanks' continuing treatment and physical therapy certainly pales in comparison to the overall issue of the claimant's disability.

Although the insurance company may have erred in failing to authorize continued physical therapy and visits with Dr. Shanks, Section 72-804 provides for "reasonable attorney fees." Certainly reasonable suggests commensurate with the offense.

Although claimant cites numerous cases to support his argument that the defendants should pay all attorney fees, this is not a case in which a claim was unreasonably denied or medical treatment refused. The claimant's medical bills were paid, as was his physical therapy, until such time as he was evaluated and found to be medically stable.

In Dr. Adams' evaluation of the claimant on November 11, 1999, he specifically responded to an inquiry as to "what further treatment, if any, do you recommend?" He noted that the prior treatment had included a significant amount of physical therapy and the claimant had been off work for a lengthy time with some improvement of his lumbar pain according to the recent medical records. Dr. Adams indicated there was no additional treatment that had a significant likelihood of improving chronic low back pain and that surgery was not an option. He then went on to say that the claimant had reached maximum medical improvement as to the May 11, 1999, accident. Hrg Ex. A, panel report.

In his deposition Dr. Adams was asked:

Q. Would ongoing physical therapy be called for with that degree of stenosis or lumbar—or degenerative changes?

A. It's questionable whether physical therapy would help. You have to determine that there is a problem with the spine where physical therapy would help, and I don't think there was. You can have the person do some physical therapy for a relatively short period of time to see if it would help a person's subjective complaints, but the physical therapy isn't going to effect the degenerative changes of his spine.

Adams Depo., p. 26, LL. 6-17.

The majority of the efforts of the claimant's attorney were directed toward persuading the Industrial Commission that the claimant was totally disabled. To that end, he arranged for the evaluation by Paula Taylor, Kootenai Medical Center; took the deposition of Dan Brownell, vocational consultant for the ICRD; and took the deposition of Dr. Shanks. Although questions were asked of Dr. Shanks regarding the value of physical therapy, that was by no means the primary focus of the deposition. A review of the claimant's brief reveals one-half page dedicated to his entitlement to payment of medical benefits and two and a half pages devoted to his claim for attorney fees—less than 3 out of the 47 pages in his opening brief and another 2 pages in the 26-page reply brief.

To suggest that the defendants behavior was so egregious as to justify assessment of attorney fees for the entire amount that the claimant's attorney was able to recover for his client from these defendants is stretching the language and intent of Section 72-804 beyond recognition.

The Industrial Commission has in far too many cases to mention concluded that an award of attorney fees should be proportionate to the amount recovered or the time expended in recovering that particular amount.

In support of his request for an award of attorney fees against all amounts recovered from these defendants, claimant cites the case of *Kirkpatrick v. Transtector Systems*, 114 Idaho 559, 758 P.2d 713 (1988). In that case, the surety had denied a claim in its entirety, contesting jurisdiction and the occurrence of an accident. The Industrial Commission found that "the defendants had no reasonable ground for asserting that Idaho had no jurisdiction over the claimant's claim or that the claimant was not in the course of his employment when the accident occurred." Although the Industrial Commission had awarded attorney fees in the amount of 25% of all benefits paid in the past and to be paid in the future to the claimant, the Idaho Supreme Court concluded that attorney fees should only be based upon a percentage of the compensation paid from the time the application for hearing was filed.

The application of *Kirkpatrick* to this case is inapposite. That involved total denial of a claim on all issues.

The other primary case cited by the claimant is *Stigall v. J. D. Lumbar, Inc. and Argonaut Northwest Ins. Co.*, I.C. No. 84-469890. In that case, the claimant's benefits had been paid and a compensation agreement entered into and approved by the Industrial Commission on March 7, 1986. In the hearing, brought to set aside the compensation agreement and also raising issues of fraud, the Industrial Commission declined to set aside the agreement. They did, however, award attorney fees for unreasonable handling of the case. The Industrial Commission noted that in January 1985 the claimant had moved from eastern Washington, 300 miles to western Washington where he lived until 1987. His efforts to obtain authorization for medical treatment near his new residence had been denied and the surety apparently authorized the treatment with the former physician, 300 miles away. The Industrial Commission found that the claimant was entitled to an award of

attorney fees for the unreasonable conduct of the surety in denying the claimant medical consultation and treatment in the area of his new residence. The claimant, through his attorneys (John T. Mitchell and Thomas A. Mitchell), was awarded attorney fees on the medical benefits and additional disability benefits, which the Industrial Commission awarded.

That case again is distinguishable from the one before the Industrial Commission in the nature of the claim, and the conduct of the parties. The medical benefits and additional disability benefits were the items which had been denied and which were being sought by *Stigall*. In this case, there was a dispute as to whether and to what extent the claimant was disabled, including the issue of permanent total disability. The Industrial Commission did not find that the parties contested the amount of the claimant's disability unreasonably, as they did in *Stigall*, and thus, assessment of attorney fees against these defendants as to that portion of the award of total disability for which they may be liable, is inconsistent and inappropriate.

For the above reasons, the defendants request that the Industrial Commission issue its order finding that the defendants are liable for an attorney fee award proportionate to the amount recovered, i.e., \$606.55, and/or the actual amount of attorney time spent on that specific issue.

DATED this 5th day of October, 2001.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 

John W. Barrett

for Glenna Christensen - Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of October, 2001, I caused a true and correct copy of the foregoing **DEFENDANTS HAGADONE AND ROYAL INDEMNITY'S RESPONSE TO CLAIMANT'S MEMORANDUM REGARDING ATTORNEY FEES** to be served by the method indicated below, and addressed to the following:

John T. Mitchell
Mitchell Law Firm
408 East Sherman, Suite 316
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☒ US Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Bentley Stromberg
Clements Brown & McNichols
321 13th Street
PO Box 1510
Lewiston, ID 83501-1510
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☒ US Mail, Postage Prepaid
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☐ Overnight Mail
☐ Facsimile



John W. Barrett

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105 W. Eighth Ave., Suite 6080
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Holy Family Office
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Spokane, WA 99207-1276
Phone (509) 484-5355
Fax (509) 483-6608

NorthPointe Office
9631 N. Nevada, Suite 304
Spokane, WA 99218-3604
Phone (509) 465-1300
Fax (509) 465-1313

Return this portion with your check.

BILL TO:

ROBERT J STODDARD
E 880 PEARL AVE
HAYDEN ID 83835

Amount Remitted: \$

Account Number: 147645

Statement Date: 08/22/01

Patient's Balance Due: \$509.13

Page: 1 of 1

PLEASE NOTE: If a "1" appears in this column, we have filed with your primary carrier. If a "2" appears, we have also filed with your secondary carrier. Our records show your insurance as follows:

DATE	PRO-VIDER	DIAG	REFERENCE	DESCRIPTION OF SERVICES	AMOUNT CHARGED	PAYMENTS / ADJ.	INSURANCE PENDING	YOUR BALANCE	
08/22/01	3			PREVIOUS BALANCE				501.71	
				FINANCE CHARGES	7.42			7.42	
				MR STODDARD-PER GATES MCDONALD, YOU WERE DEEMED MEDICALLY STABLE ON 11-11-99. THE SERVICES ON THIS ACCOUNT WERE PROVIDED AFTER THAT DATE. THESE BILLS ARE YOUR RESPONSIBILITY. THANK YOU. DAWN					
				MR STODDARD, PER YOUR ATTORNEY JOHN MITCHELL. THIS BILL IS YOUR RESPONSIBILITY. THANK YOU FOR YOUR PROMPT PAYMENT. DAWN					
				PER PT, HAS 1 MORE BRIEFING TO FINISH UP CASE, SHOULD BE SETTLED IN A MONTH, WILL PAY THEN. DLS					
ACCOUNT BALANCE		(REFER TO PATIENT'S BALANCE DUE FOR AMOUNT TO PAY)		CURRENT BALANCE	OVER 30 DAYS	OVER 60 DAYS	OVER 90 DAYS	OVER 120 DAYS	PATIENTS BALANCE DUE
509.13				14.73	0.00	7.20	7.20	480.00	509.13

PROVIDERS 3 WILLIAM M SHANKS, M.D.	ACCOUNT NUMBER 147645	NAME ROBERT J STODDARD	TELEPHONE IF ANY QUESTIONS (509) 624-2226
	STATEMENT DATE 08/22/01	MAKE CHECK PAYABLE TO WILLIAM M SHANKS, M.D.	
	TAX I.D. # 91-1502837		

IF PAYING BY
☐ MASTERCARD OR
☐ VISA
 PLEASE COMPLETE

CARD NUMBER _____
 SIGNATURE _____

AMOUNT _____
 EXP. DATE _____

149

Fri Sep 14, 2001
11:12:16 am

NORTHWEST ORTHOPAEDIC SPECIALISTS
ACCOUNT ACTIVITY REPORT
(INQUIRY HARDCOPY)

No.0978 P. 1/3

Page: 1

147645 STODDARD, ROBERT J Office: 2 NORTHWEST ORTHOPAEDI Code1: Payclass: 4 PRIV INS
E. 880 PEARL AVE. Doctor: 3 WILLIAM M SHANKS, M. Code2: Emp/Par: HAGADONE CORP
HAYDEN, ID 83835 Ref Dr: 999 NONE Birth: Lawyer:
(208) 762-3658 Diag: 1st Seen: 02/10/98 Stmt: YES (PAT)
SS-No.: Misc. Date: Recall:

	Date	OffDoc	Code	Diag#	ICD9	Diagnosis	Proc#	CPT	Procedure	Amount	Remain	SIRB
1.	02/10/98	2007	7	38	724.5	BACKACHE UNSPEC.	228	99212	LIM PROB/STRPWD DEC	36.00		YYP1
								03/14/98	PRIV INS PAYME - SAFECO	36.00		
2.	03/14/98		1004			CREDIT			PRIV INS PAYME - SAFE	36.00		Y
3.	03/24/98	1007	7	38	724.5	BACKACHE UNSPEC.	229	99213	EXP PROB/LOW COMP DEC	50.00		YYP1
								04/22/98	LABOR&IND OTHE - GENERA	50.00		
4.	04/22/98		1007			CREDIT			LABOR&IND OTHE - GENE	50.00		Y
5.	06/01/98	1007	7	38	724.5	BACKACHE UNSPEC.	196	99080	REPORTS/COPIES	37.38		NNP
								06/02/98	MED/LEGAL PAYMENT	37.38		
6.	06/02/98		1009			CREDIT			MED/LEGAL PAYMENT	37.38		Y
7.	06/03/99	1003	7	419	724.02	STENOSIS SPINAL.	224	99203	DETAIL EXAM/LOW COMPL	100.00		YYP1
								10/30/00	LABOR&IND OTHE - GATES	100.00		
8.	06/22/99	2003	7	419	724.02	STENOSIS SPINAL.	228	99212	LIM PROB/STRFWD DEC	40.00		YYP1
								10/02/99	LABOR&IND OTHE - GATES	40.00		
9.	07/13/99	2003	7	419	724.02	STENOSIS SPINAL.	228	99212	LIM PROB/STRFWD DEC	40.00		YYP1
								10/02/99	LABOR&IND OTHE - GATES	40.00		
10.	08/30/99	1007	7	419	724.02	STENOSIS SPINAL.	196	99080	REPORTS/COPIES	8.00		NNP
								08/30/99	MED/LEGAL PAYMENT	8.00		
11.	08/30/99		1009			CREDIT			MED/LEGAL PAYMENT	8.00		Y
12.	08/31/99	2003	7	1001	722.52	DEGENERATION LUMB	229	99213	EXP PROB/LOW COMP DEC	57.00		YYP1
								10/19/99	LABOR&IND OTHE - GATES	57.00		
13.	09/21/99	2003	7	1001	722.52	DEGENERATION LUMB	228	99212	LIM PROB/STRFWD DEC	43.00		YYP1
								10/26/99	LABOR&IND OTHE - GATES	43.00		
14.	10/02/99		1007			CREDIT			LABOR&IND OTHE - GATE	40.00		Y
15.	10/02/99		1007			CREDIT			LABOR&IND OTHE - GATE	40.00		Y
16.	10/06/99	1018	7	1001	722.52	DEGENERATION LUMB	234	99243	DET EXAM/LOW COMP DEC	140.00		YYP1
								11/15/99	LABOR&IND OTHE - GATES	140.00		
17.	10/19/99		1007			CREDIT			LABOR&IND OTHE - GATE	57.00		Y
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								10/21/99	MED/LEGAL PAYMENT	500.00		
19.	10/21/99		1009			CREDIT			MED/LEGAL PAYMENT	500.00		Y
20.	10/26/99		1007			CREDIT			LABOR&IND OTHE - GATE	43.00		Y
21.	11/15/99		1007			CREDIT			LABOR&IND OTHE - GATE	140.00		Y
22.	11/16/99	2003	7	1001	722.52	DEGENERATION LUMB	228	99212	LIM PROB/STRFWD DEC	43.00		YYP1
								01/10/00	LABOR&IND OTHE - GATES	43.00		

Fri Sep 14, 2001

NORTHWEST ORTHOPAEDIC SPECIALISTS

Page: 2

11:12:16 am

ACCOUNT ACTIVITY REPORT

(INQUIRY HARDCOPY)

147645 STODDARD, ROBERT J (continued)...

23.	11/23/99	1003	7	1001 722.52	DEGENERATION LUMB	196 99080	REPORTS/COPIES	47.40		NNP
						11/23/99 MED/LEGAL PAYMENT		47.40		
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						11/23/99 MED/LEGAL PAYMENT		3.70		
25.	11/23/99		1009		CREDIT		MED/LEGAL PAYMENT	51.10		Y
26.	01/10/00		1007		CREDIT		LABOR&IND OTHE - GATE	43.00		Y
27.	01/10/00	3003	7	1001 722.52	DEGENERATION LUMB	229 99213	EXP PROB/LOW COMP DEC	57.00		YYP1
						06/17/00 LABOR&IND OTHE - GATES		57.00		
28.	01/28/00	1003	7	1001 722.52	DEGENERATION LUMB	228 99212	LIM PROB/STRFWD DEC	48.00	48.00	YY11
29.	03/03/00	1003	7	1001 722.52	DEGENERATION LUMB	228 99212	LIM PROB/STRFWD DEC	48.00	48.00	YY11
30.	04/07/00	1003	7	1001 722.52	DEGENERATION LUMB	228 99212	LIM PROB/STRFWD DEC	48.00	48.00	YY11
31.	05/05/00	1003	7	1001 722.52	DEGENERATION LUMB	228 99212	LIM PROB/STRFWD DEC	48.00	48.00	YY11
32.	06/02/00	1003	7	1001 722.52	DEGENERATION LUMB	228 99212	LIM PROB/STRFWD DEC	48.00	48.00	YY11
33.	06/17/00		1007		CREDIT		LABOR&IND OTHE - GATE	57.00		Y
34.	07/07/00	1003	7	510 789.0	PAIN ABDOMINAL	229 99213	EXP PROB/LOW COMP DEC	62.00	62.00	YY11
35.	07/07/00	1003	7	510 789.0	PAIN ABDOMINAL	144 72170	X-RAY PELVIS AP ONLY	55.00	55.00	YY11
36.	07/07/00	1003	7	510 789.0	PAIN ABDOMINAL	162 73510	X-RAY HIP COMPLETE 2	75.00	75.00	YY11
37.	09/01/00	1003	7	510 789.0	PAIN ABDOMINAL	228 99212	LIM PROB/STRFWD DEC	48.00	48.00	YY11
38.	09/18/00	2003	7	510 789.0	PAIN ABDOMINAL	196 99080	REPORTS/COPIES	36.17		NNP
						09/18/00 MED/LEGAL PAYMENT		36.17		
39.	09/18/00	2003	7	510 789.0	PAIN ABDOMINAL	1412 99080.1	SALES TAX	3.92		NNP
						09/18/00 MED/LEGAL PAYMENT		2.92		
40.	09/18/00		1009		CREDIT		MED/LEGAL PAYMENT	39.09		Y
41.	10/30/00		1007		CREDIT		LABOR&IND OTHE - GATE	100.00		Y
42.	11/09/00	1003	7		No diagnosis	196 99080	REPORTS/COPIES	10.00		NNP
						11/09/00 PUBLIC ASSIST - IDAHO D		10.00		
43.	11/09/00		1006		CREDIT		PUBLIC ASSIST - IDAHO	10.00		Y
44.	03/20/01	1003	7	510 789.0	PAIN ABDOMINAL	196 99080	REPORTS/COPIES	22.74		NNP
						03/20/01 PRIV INS PAYMENT		22.74		
45.	03/20/01	1003	7	510 789.0	PAIN ABDOMINAL	1412 99080.1	SALES TAX	1.84		NNP
						03/20/01 PRIV INS PAYMENT		1.84		
46.	03/20/01		1004		CREDIT		PRIV INS PAYMENT	24.58		Y
47.	05/16/01	2003	4		No diagnosis	196 99080	REPORTS/COPIES	10.00		NNP
						05/16/01 PUBLIC ASSIST - IDAHO D		10.00		
48.	05/16/01		1006		CREDIT		PUBLIC ASSIST - IDAHO	10.00		Y
49.	05/23/01	2003	4		No diagnosis	1254	FINANCE CHARGES	7.20	7.20	YNP
50.	06/20/01	2003	4		No diagnosis	1254	FINANCE CHARGES	7.20	7.20	YNP
51.	07/25/01	2003	4		No diagnosis	1254	FINANCE CHARGES	7.31	7.31	YNP
52.	08/22/01	2003	4		No diagnosis	1254	FINANCE CHARGES	7.42	7.42	YNP

05/27/99 NX VO: X-RAYS HERE FROM KOOTENAI MED. CTR FOR APPT W/WMS ON
6-3-99 AT THE DTO. X-RAYS SENT TO DTO/MS

05/28/99 NX DTO: CT, MRI, & PLAIN FILMS OF LSPINE HERE FROM KMC TO WMS'
OUTSIDE FILE/AM

Fri Sep 14, 2001

NORTHWEST ORTHOPAEDIC SPECIALISTS

Page: 3

11:12:16 am

ACCOUNT ACTIVITY REPORT

(INQUIRY HARDCOPY)

147645 STODDARD, ROBERT J (continued)...

09/01/99 NX DTO; MRI LS AND CT UPPER EXT. HERE FROM KOOTENAI MED. CTR
TO DR. SHANKS DESK/MS (X2 SETS) 11-9-99 W/PT FOR IME/AM

04/23/01 NX DOT SCOTT NO LONGER THERE-MARY CRONIN HANDLING CALLS-
1-888-934-8056. DLS LEFT MESSAGE FOR HER TO CALL. DLS

04/23/01 NX DEEMED MEDICALLY STABLE 11-11-99. PATIENT BILLS. DLS

05/15/01 SK MR STODDARD-PER GATES MCDONALD, YOU WERE DEEMED MEDICALLY
STABLE ON 11-11-99. THE SERVICES ON THIS ACCOUNT WERE

05/15/01 SK PROVIDED AFTER THAT DATE. THESE BILLS ARE YOUR RESPON-
SIBILITY. THANK YOU. DAWN

05/25/01 NX PER PATIENT-CLAIMS SHOULD BE BILLED TO ATTY JOHN MITCHELL.

06/19/01 SK MR STODDARD, PER YOUR ATTORNEY JOHN MITCHELL, THIS BILL IS
YOUR RESPONSIBILITY. THANK YOU FOR YOUR PROMPT PAYMENT. DAWN

06/22/01 SK PER PT. HAS 1 MORE BRIEFING TO FINISH UP CASE, SHOULD BE
SETTLED IN A MONTH, WILL PAY THEN. DLS

Date Time By Action
05/17/01 04:49PM admin1 ADDED TO SUBPOOL 17 INITIAL REVIEW POOL

Payclass: 4 PRIV INS

Relation: SELF

SUBSCRIBER#:

GROUP #:

Ins. Co.: 0

Subscriber: HAGADON CORP

Accept Assign: YES

Onset Date:

Deductible: 0.00

Claim #	Type	Sys Date	Clm Date	Amount	Remain	Pycl	Insurance
185722	NORM	02/18/98	02/10/98	36.00	0.00	7/2674	LABOR & IND. OTHER - GENERAL INSU
190103	NORM	04/01/98	03/24/98	50.00	0.00	7/2674	LABOR & IND. OTHER - GENERAL INSU
235320	NORM	06/17/99	06/03/99	100.00	100.00	7/3225	LABOR & IND. OTHER - GIESY, GREER
237123	NORM	07/01/99	06/22/99	40.00	0.00	7/3225	LABOR & IND. OTHER - GIESY, GREER
239681	NORM	07/23/99	07/13/99	40.00	0.00	7/3280	LABOR & IND. OTHER - GATES MCDONA
247674	NORM	09/16/99	08/31/99	57.00	0.00	7/3280	LABOR & IND. OTHER - GATES MCDONA
249405	NORM	09/30/99	09/21/99	43.00	0.00	7/3280	LABOR & IND. OTHER - GATES MCDONA
251093	NORM	10/14/99	10/06/99	140.00	0.00	7/3280	LABOR & IND. OTHER - GATES MCDONA
255911	NORM	11/24/99	11/16/99	43.00	0.00	7/3280	LABOR & IND. OTHER - GATES MCDONA
261501	NORM	01/20/00	01/10/00	57.00	0.00	7/3280	LABOR & IND. OTHER - GATES MCDONA
263774	NORM	02/10/00	01/28/00	48.00	48.00	7/3280	LABOR & IND. OTHER - GATES MCDONA
266825	NORM	03/09/00	03/03/00	48.00	48.00	7/3280	LABOR & IND. OTHER - GATES MCDONA
271610	NORM	04/20/00	04/07/00	48.00	48.00	7/3280	LABOR & IND. OTHER - GATES MCDONA
274799	NORM	05/18/00	05/05/00	48.00	48.00	7/3280	LABOR & IND. OTHER - GATES MCDONA
277872	NORM	06/15/00	06/02/00	48.00	48.00	7/3280	LABOR & IND. OTHER - GATES MCDONA
282379	NORM	07/20/00	07/07/00	192.00	192.00	7/3280	LABOR & IND. OTHER - GATES MCDONA
289445	NORM	09/21/00	09/01/00	48.00	48.00	7/3280	LABOR & IND. OTHER - GATES MCDONA

Balance	Current	Over-30	Over-60	Over-90	Over-120	YTD Charge	YTD Credit	Last Pay Amt	Last Pay Date
509.13	7.42	7.31	7.20	7.20	480.00	1671.90	1162.77	10.00	05/16/01

152

North Idaho Physical Therapy, Inc.
 950 Ironwood Drive #5
 Coeur d'Alene, ID 83814
 (208) 664-8194
 ID # 82-0483060

ROBERT STODDARD
 880 E PEARL AVENUE
 HAYDEN, ID 83835
 (208) 762-3658

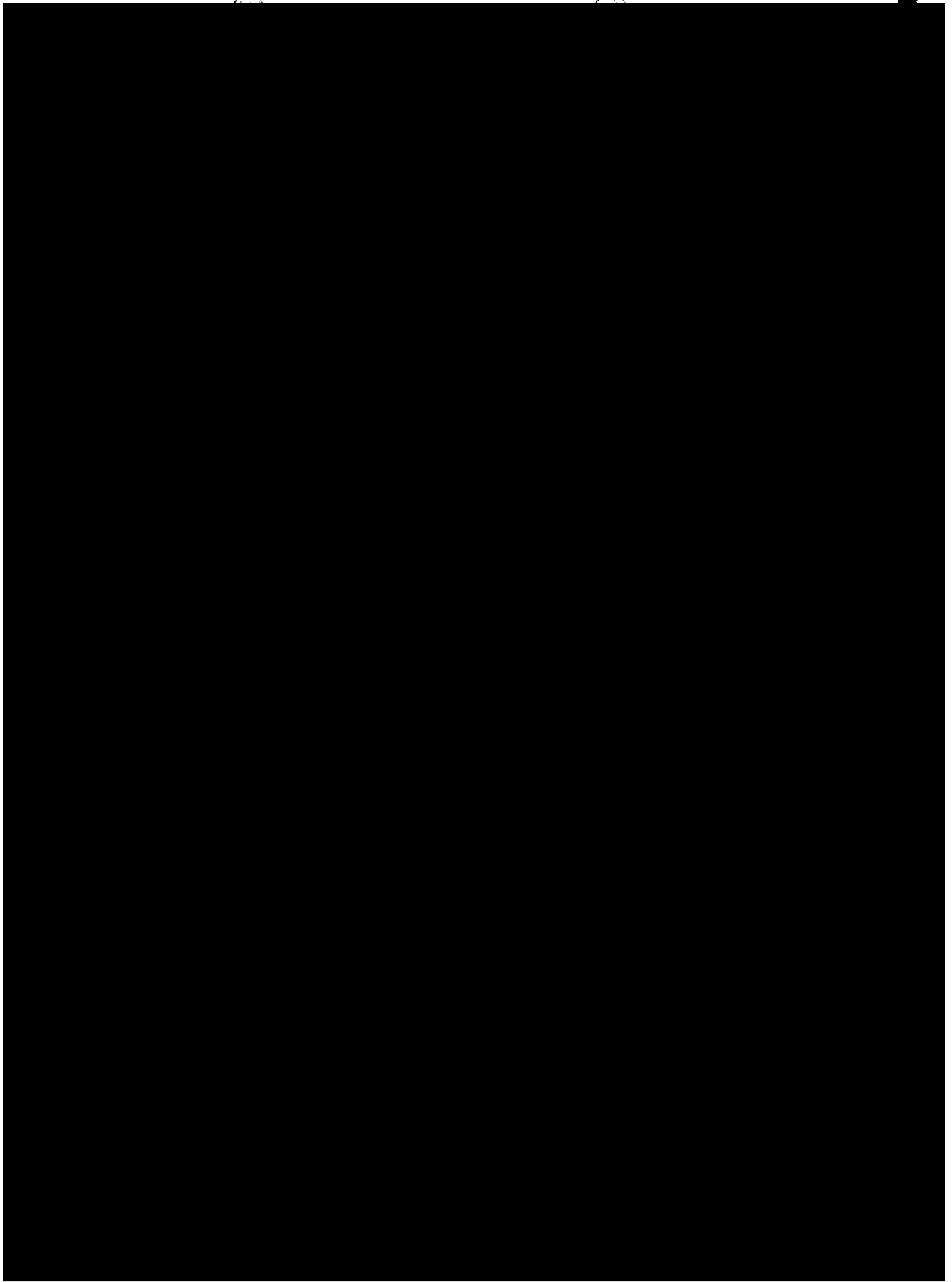
DATE : 09/11/2001
 PATIENT : ROBERT STODDARD
 ACCOUNT : 1STODRO
 REFERRAL : SELF
 INJURED : / /
 EMPLOYER : HAGADONE CORPORATION

DIAGNOSIS 846.0 SPRAINS/STRAIN LUMBOSACRAL

DATE	DESCRIPTION	CHARGES	PAID	ADJUSTS	BALANCE
11/08/2000 97799	MED EXER PRGRM 3 MONTH MEMBERSHIP	45.00			45.00
11/14/2000 ROA #6023	THANK YOU		15.00		30.00
11/14/2000 ROA #6024	THANK YOU		30.00		0.00
TOTALS		45.00	45.00	0.00	
ACCOUNT BALANCE					0.00

A finance charge of 1.5% per month will be charged on all unpaid balances over 90 days

Attn:
 John Mitchell, Attorney



JOHN T. MITCHELL
408 E. Sherman Avenue, Suite 316
Coeur d'Alene, ID 83814
Telephone: 208 664-8111
ISB #3375

Attorney for Claimant

BEFORE THE INDUSTRIAL COMMISSION, STATE OF IDAHO

ROBERT STODDARD,	:	Case No. I.C. No. 96-018310
	:	I.C. No. 97-036904
	:	I.C. No. 99-016897
Claimant,	:	
	:	
v.	:	
HAGADONE CORPORATION	:	CLAIMANT'S REPLY TO
	:	"GENERAL'S MEMORANDUM
Employer,	:	IN SUPPORT OF MOTION FOR
	:	RECONSIDERATION
and	:	AND CLARIFICATION" and to
	:	"DEFENDANTS HAGADONE AND
GENERAL INSURANCE COMPANY	:	ROYAL INDEMNITY'S
OF AMERICA,	:	MEMORANDUM IN SUPPORT OF
	:	MOTION FOR RECONSIDERATION"
Surety,	:	
	:	
and	:	
	:	
ROYAL INDEMNITY COMPANY,	:	
	:	
Surety.	:	

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1. CLAIMANT'S REPLY TO "GENERAL'S MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION AND CLARIFICATION" and to "DEFENDANTS HAGADONE AND ROYAL INDEMNITY'S MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION"

I. CLAIMANT'S REPLY TO "GENERAL'S MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION"

Defendant General Insurance filed its "Memorandum in Support of Motion for Reconsideration and Clarification", dated September 27, 2001. Defendant General writes, regarding Claimant's July 27, 1997 motor vehicle accident: "He did, however, sustain significant upper extremity and neck injuries which limited his ability to work in his "side" job as a tree-trimmer and his physician assigned a 20% PPI rating". Memorandum in Support of Motion for Reconsideration and Clarification, p.2. This is not accurate. The only reason he was unable to do the tree trimming work and topiary work that he had done in 1996, was because of the residuals from the hernia surgery from the May 5, 1996 hernia industrial accident. Tr. p. 65, L. 19 - p. 66, L. 16. This was found to be the case by the Commission in its Findings, Conclusions and Recommendation, pp. 15 - 16, ¶ 22.

General Insurance also writes: "Rather, it was the July 27, 1997, auto accident-related injuries and the May 11, 1999 low back injury which rendered claimant totally and permanently disabled." Memorandum in Support of Motion for Reconsideration and Clarification, p. 6. General provides no citation for this claim. The claim, as it pertains to the July 27, 1997 auto accident, is false. No doubt the May 11, 1999 low back injury rendered claimant totally and permanently disabled, but the July 27, 1997 auto accident caused Mr. Stoddard to miss not one single day of work. It resulted in no modifications to the work place. As shown above, it was the surgeries from the May 5, 1996 hernia that kept him from performing his tree trimming and topiary work.

II. CLAIMANT'S REPLY TO "DEFENDANTS HAGADONE AND ROYAL INDEMNITY'S MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION."

2. CLAIMANT'S REPLY TO "GENERAL'S MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION AND CLARIFICATION" and to "DEFENDANTS HAGADONE AND ROYAL INDEMNITY'S MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION"

Defendant Royal Indemnity Company Filed its "Memorandum in Support of Motion for Reconsideration" dated September 27, 2001. On that date, Defendant Royal also filed "Defendants Hagadone and Royal Indemnity's Response to Claimant's Motion for Payment Under Idaho Code Section 72-313, Alternative Motion for Clarification (Reconsideration) Pursuant to Idaho Code Section 72-718."

In Defendant Royal Indemnity Company's "Memorandum in Support of Motion for Reconsideration", Royal concludes with the following request of the Commission:

Defendants request the Industrial Commission to make specific findings regarding the prior impairments related to the motor vehicle accident and the degenerative disc disease and determine the effect of these preexisting impairments on claimant's disability prior to the May 1999 accident. Defendants further request that the Industrial Commission redetermine apportionment attributable to the May 1999 accident after making those findings.

Defendants request these findings to assure an appropriate record on appeal, if necessary, and to allow General and Royal to be bound by the findings in respect to any claim against the ISIF.

Defendants Hagadone and Royal Indemnity's Memorandum in Support of Motion for Reconsideration, p. 6. Claimant submits that any impairments related to the July 1997 motor vehicle accident and to any prior degenerative disc disease, are not necessary to determine the liability of the parties now before the Commission. This is true because as to both of these impairments, if such impairments exist, existed before the May 11, 1999 industrial accident for which Royal is responsible, and as surety for the last industrial injury, Royal is responsible for all portions of the total and permanent disability award, except for the portion for which General is responsible. This remains true until such time as Royal brings in the ISIF and succeeds on its case against the ISIF. If these issues are decided now by the Commission, the Commission may be deciding these issues again at a later time, if Royal chooses to bring in the ISIF. At the present time, it seems that the ruling asked for by Royal would merely be

3. CLAIMANT'S REPLY TO "GENERAL'S MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION AND CLARIFICATION" and to "DEFENDANTS HAGADONE AND ROYAL INDEMNITY'S MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION"

advisory.

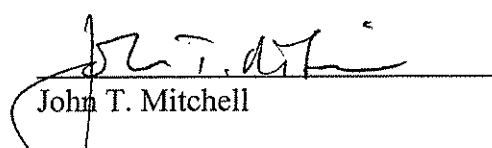
Royal, at page 2 of its "Defendants Hagadone and Royal Indemnity's Response to Claimant's Motion for Payment Under Idaho Code Section 72-313, Alternative Motion for Clarification (Reconsideration) Pursuant to Idaho Code Section 72-718", writes:

In the meantime, however, in order to assure that the claimant receives his benefits, defendants suggest that the appropriate order is one directing the parties to pay benefits to the claimant in accordance with the Industrial Commission order and then, as to the remaining 20%, a proportionate share thereof. In other words, the parties have been assigned liability of 80% of the disability. General is liable for 25% of the 80%, while the 60% assigned to Royal represents 75% of the amount awarded. Defendants propose that the Industrial Commission direct Royal to pay 75% of the permanent disability rate to the claimant, obligating both parties in proportion to the Industrial Commission award.

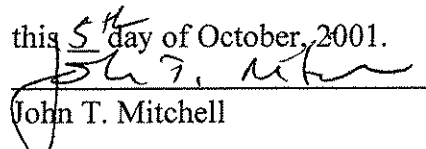
Claimant does not argue with this interim solution. It is clear that Claimant is totally and permanently disabled. No party has moved for reconsideration on that issue. Until Royal brings in the ISIF and succeeds in its case against the ISIF, claimant is entitled to 100% of total permanent disability benefits, from General and Royal. Claimant has made his Motion for Payment under I.C. §72-313. That motion, as well as Claimant's Motion for Interest under I.C. §72-734 must be ordered by the Commission.

Dated this 5th day of October, 2001.

True copy mailed to:
Bentley Stromberg
P.O. Box 1510
Lewiston, ID 83501


John T. Mitchell
Glenna Christensen
P.O. Box 829
Boise, ID 83701

this 5th day of October, 2001.


John T. Mitchell

4. CLAIMANT'S REPLY TO "GENERAL'S MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION AND CLARIFICATION" and to "DEFENDANTS HAGADONE AND ROYAL INDEMNITY'S MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION"

159

ORIGINAL

JOHN T. MITCHELL
THOMAS A. MITCHELL
408 E. Sherman Avenue, Suite 316
Coeur d'Alene, ID 83814
Telephone: 208 664-8111
ISB #3375

Attorneys for Claimant

BEFORE THE INDUSTRIAL COMMISSION, STATE OF IDAHO

ROBERT STODDARD,

Claimant,

v.

HAGADONE CORPORATION

Employer,

and

GENERAL INSURANCE COMPANY
OF AMERICA,

Surety,

and

ROYAL INDEMNITY COMPANY,

Surety.

Case No. I.C. No. 96-018310
I.C. No. 97-036904
I.C. No. 99-016897

CLAIMANT'S REPLY MEMORANDUM
TO DEFENDANTS HAGADONE AND
ROYAL INDEMNITY'S RESPONSE TO
CLAIMANT'S MEMORANDUM RE:
ATTORNEY FEES

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Defendants Hagadone and Royal Indemnity have filed "Defendants Hagadone and Royal Indemnity's Response to Claimant's Memorandum Regarding Attorney Fees" (Defendants' Response Memorandum Regarding Attorney Fees), in which they argue the Commission should only award as attorney fees 25% of the \$606.55 that Royal has finally paid to Dr. Shanks and North Idaho Physical Therapy. Defendants' Response Memorandum Regarding Attorney Fees, p. 1. The only reason Royal paid these benefits is because the Commission ordered them to do so, after determining those benefits were unreasonably denied by Royal. September 7, 2001 Order, ¶ 1, 6.

**I. PAYMENT OF DR. SHANKS AND NORTH IDAHO PHYSICAL THERAPY,
BUT STILL NO PAYMENT FOR THE TREADMILL.**

What Royal hasn't told the Commission, is the fact that it has yet to pay for or lease the treadmill, which the Commission also ordered in the first paragraph of its September 7, 2001 Order. The Commission wrote:

1. Royal is liable for the costs associated with Claimant's physical therapy and Dr. Shanks' fees. **They are also liable for continued physical therapy and/or the use of a treadmill should Claimant's treating physician deem it medically necessary.**

September 7, 2001 Order, ¶ 1. (bold added). While Royal has paid for past therapy and the past bills of Dr. Shanks, Royal has done nothing to pay for the treadmill specifically prescribed by Dr. Shanks. On September 20, 2001, Dr. Shanks prescribed a True 500 HREO Treadmill, obviously he "deemed it medically necessary" per the terms of the Commission's Order. That prescription was faxed to Glenna Christensen on September 20, 2001, along with a letter from the undersigned asking if Royal preferred to lease or purchase the treadmill. Second Affidavit of John T. Mitchell in Support of Attorney Fees. Receiving no response from Glenna Christensen, a follow-up letter was faxed to Glenna Christensen on October 5, 2001, again asking if Royal preferred to lease or purchase the treadmill. *Id.* To date, there has been no response. *Id.*

II. THE TREADMILL "SIGNIFICANTLY IMPROVED" CLAIMANT'S CONDITION.

Next, Royal argues:

In support of his request [for attorney fees], the claimant's attorney alleges that had the treadmill been provided it could have "significantly improved" claimant's condition. In fact, it is quite clear from the record that despite months of physical therapy and use of the treadmill, the claimant did not improve and was not able to return to work. There is no indication in Dr. Shanks' deposition that he believed the claimant ever would be able to return to work. The physical therapy, which the claimant had, did not do any good in and of itself, according to Dr. Shanks' records.

Defendants' Response Memorandum Regarding Attorney Fees, p. 2. Please note Royal provided not a single citation to the record or transcript to support these claims. The record shows Royal's claims to be false. Dr. Shanks pleaded with Royal to reinstate the physical therapy, pointing out to them that Mr. Stoddard's symptoms **have worsened since Royal cut Mr. Stoddard's therapy after Dr. Adams' insurance panel examination.** Exhibit 20. The Commission noted this as it wrote: "After the costs associated with Claimant's treatment were terminated by Royal, Dr. Shanks wrote them a letter imploring them to resume payment for the [physical therapy] program." Findings, Conclusions, and Recommendation, p. 11, ¶ 15. The Commission found that the termination of physical therapy and medical benefits occurred during the period that Claimant was not medically stable. Findings, Conclusions, and Recommendation, p. 12, ¶ 16-17. Paula Taylor, the physical therapist referred by Dan Brownell, and whom the Commission specifically found credible, testified that the last thing you want to do with low back injuries, is to have the patient become deconditioned, as that makes them worse. Taylor depo., p. 51, L1. 1-4.

But most importantly, **the Commission has already specifically found:** "...the treadmill may be said to have 'significantly improved' Claimant's condition..." (Findings, Conclusions and Recommendations, p. 11, ¶ 15), and the Commission has specifically found Royal intentionally, wrongfully and unreasonably took that opportunity for significant improvement away from Mr. Stoddard. *Id.* pp. 28-29, ¶ 45. Royal lacks candor toward the Commission to argue otherwise.

III. ROYAL FALSELY MISSTATES *STIGALL V. J.D. LUMBER, INC.*

Royal attempts to distinguish *Stigall v. J.D. Lumber, Inc./Argonaut Northwest Ins. Co.*, I.C. No. 84-469890, arguing the amount of disability was unreasonably contested in *Stigall* but the amount of disability was legitimately contested in Mr. Stoddard's case. Royal's argument is as follows:

That [*Stigall*] case again is distinguishable from the one before the Industrial Commission in the nature of the claim and the conduct of the parties. The medical benefits and additional disability benefits were the items which had been denied and were being sought by *Stigall*. In this case, there was a dispute as to whether and to what extent the claimant was disabled, including the issue of total permanent disability. The Industrial Commission did not find that the parties contested the amount of the claimant's disability unreasonably, **as they did in *Stigall***, and thus, assessment of attorney fees against these defendants as to that portion of the award of total disability for which they may be liable, is inconsistent and inappropriate.

Defendants' Response Memorandum Regarding Attorney Fees, p. 6. (bold added). Royal obviously argues that in *Stigall*, the Commission found the defendants contested the amount of disability unreasonably, a claim that is completely false.

The truth is, that in *Stigall*, just as in Mr. Stoddard's case, the Commission awarded attorney fees as punishment for the unreasonable denial of **medical benefits**. Attorney fees in *Stigall*, just as in Mr. Stoddard's case, had nothing to do with denial of disability. In the September 7, 1989 Findings, Conclusions and Order in *Stigall*, the Commission wrote in Findings of Fact XXIV:

The Surety declined to provide treatment or even authorize examinations. We believe this was unreasonable on the part of the Surety.

Under Conclusion of Law IV in *Stigall*, the Commission held:

We have found that the Surety in this matter unreasonably denied medical care in the locale of his new residence during 1985, despite the Claimant's request that medical care and treatment be authorized by the Surety.

You can search every word of every Order of the Commission and *Stigall*, and you will nowhere find any statement that attorney fees were awarded based on an unreasonable denial of disability benefits. Royal's attorney knows they are being untruthful with the Commission when they claim that *Stigall* awarded attorney fees due to unreasonable denial of disability benefits, because it was Royal's attorney's firm (Moffatt, Thomas) that defended in *Stigall*.

Stigall is directly on point with the present case. In *Stigall*, just as in Mr. Stoddard's case, the Commission awarded attorney fees based on the unreasonable denial of medical benefits. In *Stigall*, just as with Mr. Stoddard, the Commission found that the unreasonable denial of medical benefits caused the claimant harm, and that was the reason why attorney fees were being awarded on 25% of all future benefits, and not just 25% of the medical benefits that were refused. In *Stigall*, the Commission held:

Defendants argue that any award of attorney fees must be proportionate to the amount implicated in the unreasonable conduct of the Surety, which involved the failure to pay medical bills the amount of approximately \$1,800.00, according to Defendants' argument. This argument has merit and might be accepted by the Commission in many cases. However, in this particular case, we are persuaded by the argument by Claimant that had the Defendant Surety paid the medical bills when they were incurred and authorized the treatment which was recommended for the Claimant at that time, **the Claimant might be in a different physical condition today** and might not require the surgery which has now been recommended.

Stigall, Award of Attorney Fees dated January 3, 1990, p. 4. The Commission should likewise award 25% of all benefits in Mr. Stoddard's case, because the Commission specifically found: "...the treadmill may be said to have 'significantly improved' Claimant's condition..." (Findings, Conclusions and Recommendations, p. 11, ¶ 15), and the Commission has specifically found Royal intentionally, wrongfully and unreasonably took that opportunity for significant improvement away from Mr. Stoddard. *Id.* pp. 28-29, ¶ 45.

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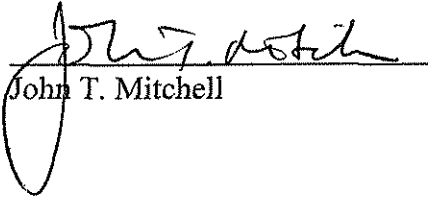
Dated this 10th day of October, 2001.



John T. Mitchell

True copy mailed to:
Bentley Stromberg
P.O. Box 1510
Lewiston, ID 83501

Glenna Christensen
P.O. Box 829
Boise, ID 83701
this 10th day of October, 2001.



John T. Mitchell

ORIGINAL

JOHN T. MITCHELL
THOMAS A. MITCHELL
408 E. Sherman Avenue, Suite 316
Coeur d'Alene, ID 83814
Telephone: 208 664-8111
ISB #3375
Attorneys for Claimant

BEFORE THE INDUSTRIAL COMMISSION, STATE OF IDAHO

ROBERT STODDARD,

Claimant,

v.

HAGADONE CORPORATION

Employer,

and

GENERAL INSURANCE COMPANY
OF AMERICA,

Surety.

Case No. I.C. No. 96-018310

I.C. No. 97-036904

I.C. No. 99-016897

SECOND AFFIDAVIT OF
JOHN T. MITCHELL
IN SUPPORT OF ATTORNEY
FEES

RECEIVED
INDUSTRIAL COMMISSION
2001 OCT 15 A 11:06

STATE OF IDAHO :

:ss.

County of Kootenai :

John T. Mitchell, being first duly sworn upon oath, deposes and says:

This affidavit is based upon my personal knowledge and I am competent to testify to the

matters stated in this affidavit.

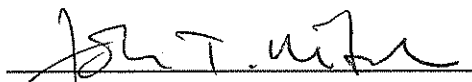
That I am attorney for Claimant, Robert Stoddard in the above matters.

That on September 20, 2001 I received a prescription from William M. Shanks, M.D., for a "True 500 HREO Treadmill" for Mr. Stoddard, a copy of which is attached as Exhibit A.

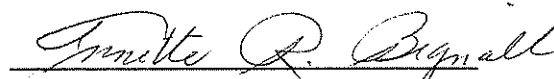
That on September 20, 2001, I faxed a letter to Glenna Christensen, making her aware of the prescription for the "True 500 HREO Treadmill", and asking her if her client preferred to purchase or lease such equipment. A copy of such letter is attached as Exhibit B.

After heard nothing from Glenna Christensen, I again wrote her and faxed to her on October 5, 2001, a letter again asking if Royal preferred to purchase or lease such equipment. A copy of such letter is attached as Exhibit C. As of the date of this Affidavit, I have not received any response from Glenna Christensen, or anyone on behalf of Royal, regarding the payment or leasing of the treadmill prescribed by Dr. Shanks.

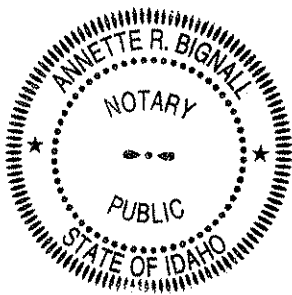
Dated this 10th day of October, 2001.


John T. Mitchell

Subscribed and sworn to before me this 10th day of October, 2001.



Notary Public for Idaho
residing at Coeur d'Alene
Comm. expires: 5/03/05

True copy mailed to:
Bentley Stromberg
P.O. Box 1510
Lewiston, ID 83501



Glenna Christensen
P.O. Box 829
Boise, ID 83701

this 10th day of October, 2001.


John T. Mitchell

NORTHWEST ORTHOPAEDIC & FRACTURE CLINIC

DAVID W. GRAINGER, M.D.
ROBERT C. BREWSTER, M.D.
WILLIAM M. SHANKS, M.D.
DOUGLAS G. NORQUIST, M.D.
RICHARD P. TRELOAR, M.D.
BRIAN J. PADRTA, M.D.

WILLIAM A. BROWNLEE, M.D.
JONATHAN P. KEEVE, M.D.
STEVEN M. SANWICK, M.D.
RUSSELL S. VANDERWILDE, M.D.
DONALD E. ELLINGSEN, M.D.

Sacred Heart Doctor's Bldg.
105 W. 8th Ave., Suite 6080W
Spokane, WA 99204-2357
Phone (509) 624-2226

Holy Family Orthopedic Clinic
235 E. Rowan, Suite 117
Spokane, WA 99207
Phone (509) 483-4625

Valley Office
1414 N. Houk
Spokane, WA 99216-1047
Phone (509) 928-4334

PATIENT

Robert Stoddard

9-20-01

LABEL ☐

REFILL	
P.R.N.	NO. OF TIMES

True 500 HREO Treadmill

oxy. For home use for exercise program for back

William M. Shanks

M.D.

Substitution Permitted

Dispense as Written

PRESCRIPTIONS REFILLED ONLY DURING OFFICE HOURS

A

168

(208) 664-8111 Telephone

THOMAS A. MITCHELL
JOHN T. MITCHELL
Attorneys At Law

408 E. Sherman Avenue, Suite 316
Coeur d'Alene, ID 83814-2778

Facsimile (208) 664-8113
E-Mail: jtmitchel@dmf.net

September 20, 2001

Fax: (208) 385-5384

Glenna Christensen
P.O. Box 829
Boise, ID 83701

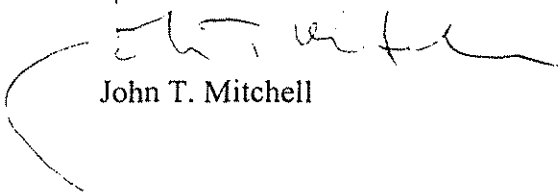
Dear Glenna:

RE: Stoddard v. Hagadone/General/Royal

Enclosed please find a prescription of dated September 20, 2001 from Dr. Shanks regarding the True 500 HREO Treadmill, addressing the issue set forth in paragraph 1 of the Industrial Commission's Order dated September 7, 2001. Could you please let me know if Royal prefers to purchase or lease such equipment?

The local provider of such equipment is Bob Thomas, Body Perfection, Inc., (208) 762-7867.

Very truly yours,



John T. Mitchell

JTM:cs

Enc.

cc: Bob Stoddard

EXHIBIT B 169

(208) 664-8111 Telephone

THOMAS A. MITCHELL
JOHN T. MITCHELL
Attorneys At Law

408 E. Sherman Avenue, Suite 316
Coeur d'Alene, ID 83814-2778

Facsimile (208) 664-8113
E-Mail: jmitchel@dmf.net

October 5, 2001

Fax: (208) 385-5384

Glenna Christensen
P.O. Box 829
Boise, ID 83701

Dear Glenna:

RE: Stoddard v. Hagadone/General/Royal

On September 20, 2001 I faxed you the prescription from Dr. Shanks regarding the True 500 HREO Treadmill. It's been over two weeks, could you please let me know if Royal prefers to purchase or lease such equipment, or if we need to take this issue up with the Industrial Commission again.

Very truly yours,


John T. Mitchell

JTM:cs
cc: Bob Stoddard

EXHIBIT

170

C

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT J. STODDARD,)	
)	
Claimant,)	
	)	IC 96-018310
v.	)	97-036904
	)	99-016897
THE HAGADONE CORPORATION,)	
)	
Employer,	)	ORDER REGARDING
	)	RECONSIDERATION
and)	
)	
GENERAL INSURANCE COMPANY)	
OF AMERICA,)	
)	
Surety,)	
)	
and	)	FILED
	)	DEC 14 2001
ROYAL INDEMNITY COMPANY,	)	INDUSTRIAL COMMISSION
)	
Surety)	
Defendants.)	
_____)	

The Commission issued its decision in the above referenced matter on September 7, 2001. Claimant has moved for immediate payment of disability benefits under Idaho Code (IC) §72-313. In the alternative, Claimant has moved for reconsideration and/or clarification pursuant to IC §72-718. Claimant argues that the Commission's decision apportioning liability for Claimant's total and permanent disability benefits is in error. Defendant General Insurance Co. (General) has also moved for reconsideration and clarification arguing that it should only be liable for its portion of disability and not for any total and permanent disability payments as it was not Employer's surety when

Claimant was injured at work the final time. Defendant Royal Indemnity Co. (Royal) agreed that an order pursuant to IC §72-313 is appropriate and has also requested reconsideration. Royal likewise argues that the Commission's apportionment is in error.

Claimant moves for an order of payment under IC §72-313 that permits the Commission in cases involving disputes strictly between sureties to order immediate payment of benefits to the Claimant while sureties dispute liability. Defendant Royal agrees that such an order would be appropriate. General argues that it is not liable for any total and permanent disability and, if it is, it should not have to begin payment until 2003. Such requests are untimely at this stage of the proceedings and, therefore, are hereby DENIED.

Claimant urges the Commission to clarify its order awarding Claimant total and permanent disability benefits under the odd-lot doctrine yet apportioning only 60% to Royal and 20% to General with 20% left unaccounted for. Claimant essentially argues that he should be paid his full benefits regardless of an apportionment decision. Royal, in its motion, agrees that the findings and order should, but do not, account for this missing 20%. *Royal offers to split this remaining liability with General.* General points out that it should only be liable for disability arising from accidents while it insured Employer and not for total and permanent disability arising from an accident occurring after it had ceased to insure Employer. As more fully analyzed below, the parties' motions for reconsideration are GRANTED.

Liability for disability inclusive of impairment at 20% was assigned to General. This figure was used to apportion 20% of Claimant's total and permanent disability benefit to General. However, apportionment among multiple sureties is only provided for

in disability cases less than total. IC §72-406. Additionally, the Idaho Supreme Court pointed out that “imposing the liability for the future disabilities suffered by an employee upon a surety which has long ceased to insure the employee’s employer would be grossly unjust. . . .” Blang v. Liberty Northwest Ins. Corp., 125 Idaho 275, 278-79, 869 P.2d 1370, 1373 -74 (1993). The Commission finds that General should have been found liable only for a 20% disability rating inclusive of impairment.

The facts of this case present numerous difficulties concerning how to apply the law appropriately in total and permanent disability cases. Claimant experienced four accidents that eventually rendered Claimant totally and permanently disabled under the odd-lot doctrine. The second accident was a non-work related car accident. General was Employer’s surety during the period covering the first two industrial accidents and Royal was Employer’s surety at the time of the last accident. Claimant worked for Employer throughout this period. ISIF was never included as a party to these proceedings.

Idaho law directs that a worker with a permanent impairment who incurs a subsequent disability rendering the worker totally and permanently disabled is to be paid lifetime benefits by the ISIF and the employer/surety. The statute states that “the employer and surety shall be liable for payment of compensation benefits only for the disability caused by the injury” IC §72-332. In total and permanent disability cases, the Court’s guidance on apportionment when pre-existing injuries are involved is specific to ISIF. *See*, Smith v. J.B. Parson, 127 Idaho 937, 908 P.2d 1244 (1996); Hamilton v. Ted Beamis Logging & Const., 127 Idaho 221, 899 P.2d 434 (1995); and Hoye v. Daw Forest Products, Inc., 125 Idaho 582, 873 P.2d 836 (1994). The Commission is unaware

of any guidance for determining a percentage only for Employer's liability in total and permanent disability cases with pre-existing impairment and/or disability.

Under the facts of this case, the Commission has determined that the last accident caused Claimant to suffer total and permanent disability. No other facts or circumstances have been presented to the Commission. Accordingly, the Commission finds that Royal should be fully liable for total and permanent disability benefits.

For the above reasons, the Findings of Fact, Conclusions of Law, and Order are hereby AMENDED in the following manner:

1. Page 18, Paragraph 27 shall be DELETED.
2. Page 28, the first full paragraph, Paragraph 44, shall be AMENDED to read as follows:

44. The Idaho Supreme Court has held that the Commission may make apportionment determinations so long as the rationale used is sufficiently explained to enable the Court to determine whether or not the apportionment is supported by substantial and competent evidence. *See, Weygint v. J.R.Simplot Company*, 123 Idaho 200, 846 P.2d 202 (1993); *Edwards v. Harold L. Harris Construction*, 124 Idaho 59, 856 P.2d 96 (1993). It is unjust to impose upon a surety any responsibility for total disability benefits from subsequent accidents beyond its coverage. *Blang v. Liberty Northwest Ins. Corp.*, 125 Idaho 275, 869 P.2d 1370(1993). Therefore, Defendant Royal is liable for Claimant's total and permanent disability pursuant to the odd-lot doctrine.

3. Page 29, Paragraph 3 shall be AMENDED to read as follows:

3. Claimant is entitled to PPD benefits of 20%, inclusive of PPI, from General as a result of Claimant's May 5, 1996, accident and injury. This equates to 100 weeks at \$228.25 for an award of \$22,825.00. General is given credit for PPI benefits previously paid.

4. Page 29, Paragraph 5 shall be AMENDED to read as follows:

5. Claimant is permanently and totally disabled pursuant to the odd-lot doctrine. Royal is liable for all such benefits.

5. Page 2, Paragraph 3 of the Order shall be AMENDED to read as follows:

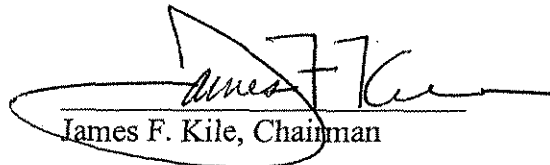
3. Claimant is entitled to PPD benefits of 20%, inclusive of PPI, from General as a result of Claimant's May 5, 1996, accident and injury. This equates to an award of \$22,825.00. General is given credit for PPI benefits previously paid.

6. Page 2, Paragraph 5 of the Order shall be AMENDED to read as follows:

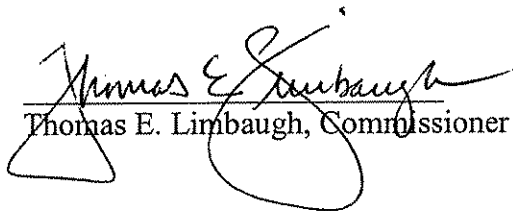
5. Claimant is permanently and totally disabled pursuant to the odd-lot doctrine. Royal is liable for all such benefits.

DATED in Boise, Idaho, this 14th day of December, 2001.

INDUSTRIAL COMMISSION


James F. Kile, Chairman


R.D. Maynard, Commissioner


Thomas E. Limbaugh, Commissioner

ATTEST:


Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of December, 2001, a true and correct copy of the foregoing **ORDER REGARDING RECONSIDERATION** was served by regular United States mail upon each of the following persons:

JOHN T MITCHELL
408 E SHERMAN AVE STE 316
CDA ID 83814-2778

BENTLEY G STROMBERG
PO BOX 1510
LEWISTON ID 83501-1510

GLENN CHRISTENSEN
PO BOX 829
BOISE ID 83701-0829

Kenna Andrus

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT J. STODDARD,)
)
Claimant,)
)
v.)
)
THE HAGADONE CORPORATION,)
)
Employer,)
)
and)
)
GENERAL INSURANCE COMPANY)
OF AMERICA,)
)
Surety,)
)
and)
)
ROYAL INDEMNITY COMPANY,)
)
)
Surety,)
Defendants.)
_____)

**IC 96-018310
97-036904
99-016897**

**ORDER FOR
ATTORNEY'S FEES**

**FILED
JAN 22 2002
INDUSTRIAL COMMISSION**

INTRODUCTION

On September 7, 2001, the Commission entered its Findings of Fact, Conclusions of Law, and Order, finding, among other issues, Employer and its Surety, Royal Indemnity Company (Royal), liable for Claimant's attorney's fees for the unreasonable denial of unpaid bills of Dr. Shanks, certain physical therapy benefits, and the corresponding TTD benefits.

All parties moved for reconsideration or clarification. On December 14, 2001, the

ORDER FOR ATTORNEY'S FEES - 1

Commission entered its Order Regarding Reconsideration wherein Royal was held liable for all of Claimant's permanent and total disability benefits.

Claimant filed his memorandum of attorney's fees and affidavit of John T. Mitchell (Attorney). Claimant requests attorney's fees of 25% of all compensation awarded against Royal. Claimant seeks such a percentage from compensation which has been paid and which remains owing. The basis of Claimant's argument is that Royal should be punished for wrongfully denying physical therapy benefits to a person who was significantly improving from the therapy and had the therapy not been discontinued, Claimant may still be working. Further, Claimant points out he could not afford to pay for the treatment himself. Royal objects to Claimant's request arguing that such an award is out of proportion to the benefits wrongfully denied (\$606.55)¹ and out of proportion to the time actually spent by Claimant's attorney in recovering that amount.

DISCUSSION

Claimant cites Kirkpatrick v. Transtector Systems, 114 Idaho 559, 759 P.2d 65 (1988) and Stigall v. J.D. Lumber, Inc., 89 IWCD 89 (1989) in support of his contention that he is entitled to attorney's fees based on all benefits paid and owing by Royal. In Kirkpatrick, the court upheld a Commission decision awarding attorney's fees on all compensation paid in the past (from the time defendants filed their Application for Hearing) and compensation to be paid in the future for defendants' unreasonably litigating conflict of law and "course and scope" issues. In Stigall, the Commission was faced with an issue similar to the one presented here:

Defendants argue that any award of attorney fees must be proportionate to the amount implicated in the unreasonable conduct of the Surety, which involved failure to pay medical bills in the amount of approximately \$1800.00, according to

¹ Claimant asserts that \$599.13 is the amount wrongfully denied. However, in Royal's response to Claimant's memorandum, they indicate they have paid \$606.55.

Defendants' argument. This argument had merit and might be accepted by the Commission in many cases. However, in this particular case, we are persuaded by the argument by Claimant that had Defendant Surety paid the medical bills when they were incurred and authorized the treatment which was recommended for the Claimant at that time, the Claimant might be in a different physical condition today and might not require the surgery which has now been recommended.

...

We believe it is reasonable to assume that litigation would never have been necessary at all in this case had Surety acted differently in 1985. While we do not intend to set a precedent for every case in which we decide to award attorney fees by the present decision, we believe it is appropriate to compensate Claimant by an award of the full amount of attorney fees he seeks. Stigall, Award of Attorney Fees filed January 3, 1999, pp. 2-3.

Even if Kirkpatrick and Stigall support Claimant's position that the Commission can award attorney's fees based on a percentage of compensation paid and owed, the Commission is not convinced that such an award is warranted under the facts of this case. Royal accepted and paid the bulk of Claimant's medical expenses until their medical evaluator found Claimant to be medically stable. Even though the Commission found that Claimant's use of the treadmill "may be said to have 'significantly improved' Claimant's condition . . .," it is too speculative to conclude that Claimant would have been able to return to some type of employment had Royal kept paying for his physical therapy, including the use of the treadmill. Further, Royal's unreasonable denial of part of Dr. Shanks' bills, physical therapy, and corresponding TTD's did not form the sole basis for prosecuting this matter by Claimant. Royal legitimately contested the extent of Claimant's disability as well as a complicated apportionment issue. Finally, it is doubtful that an attorney would have taken Claimant's case based only on the relatively small amount of compensation unreasonably denied. The potential award of significant disability in excess of impairment, which was ultimately found to be permanent and total, is a more plausible basis for pursuing this action against Royal.

Exhibit 3 to Attorney's affidavit asserts he spent 227.9 hours in the prosecution of Claimant's case against Royal. He claims \$150.00 per hour is a reasonable fee, which would amount to \$34,185.00. However, the exhibit does not identify the exact hours devoted to recovering the benefits unreasonably denied by Royal. Many aspects of Attorney's hourly services were expended on general litigation matters common to the entire process such as mediation, witness preparation, hearing, and briefing. The Commission finds the hourly charges do not provide a reasonable basis to award attorney's fees in this matter.

On June 17, 1999, Claimant and Attorney entered into an attorney fee agreement whereby Claimant agreed to pay Attorney 25% of all amounts recovered. Attorney's affidavit, Exhibit 1. The agreement is presumptively reasonable because it falls within the guidelines of the Commission rules on this subject. IDAPA 17.02.08.033. However, the benefits at issue herein required full litigation. As a result, the Commission finds 30% of the unreasonably denied benefits is a reasonable measure of attorney's fees. IDAPA 17.02.08.033.e.ii. Accordingly, the Commission determines Royal is liable for attorney's fees in the amount of \$2,192.04. [(Additional TTD benefits of \$6,707.66 x 30% = \$2,012.30) plus (unpaid physical therapy and doctor's bills of \$599.13 x 30% = \$179.74.)]

* * * * *

ORDER

Based upon the foregoing reasons, IT IS HEREBY ORDERED That:

1. Royal shall pay Claimant \$2,192.04 in attorney's fees for Royal's unreasonable denial of payment of part of Dr. Shanks' bills, physical therapy, and the corresponding TTD benefits.

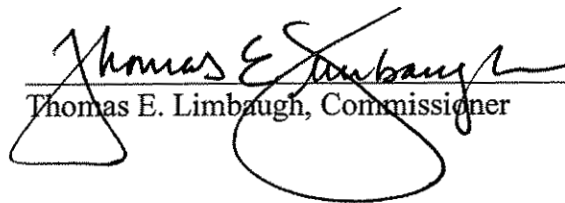
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED in Boise, Idaho, on this 22nd day of January, 2002.


INDUSTRIAL COMMISSION


James F. Kile, Chairman


R. D. Maynard, Commissioner


Thomas E. Limbaugh, Commissioner

ATTEST:


Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of January, 2002, a true and correct copy of **ORDER FOR ATTORNEY'S FEES** was served by regular United States mail upon each of the following persons:

JOHN T MITCHELL
408 E SHERMAN AVE STE 316
CDA ID 83814-2778

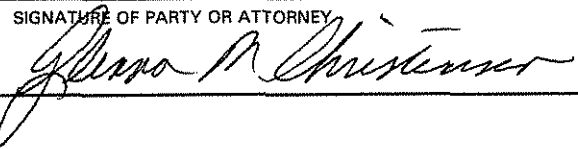
GLENNA M CHRISTENSEN
PO BOX 829
BOISE ID 83701-0829

sdn/cjh

Glenna Andrus

SEND ORIGINAL TO: INDUSTRIAL COMMISSION, JUDICIAL DIVISION, 317 MAIN STREET, BOISE, IDAHO 83720-6000 IC1002 (Rev. 11/91)

**WORKERS' COMPENSATION
COMPLAINT AGAINST THE
INDUSTRIAL SPECIAL INDEMNITY FUND**

CLAIMANT'S NAME AND ADDRESS Robert Stoddard 880 East Pearl Avenue Hayden, ID 83835	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS Thomas Mitchell 408 East Sherman Avenue - Suite 316 Coeur d'Alene, ID 83814-2778
EMPLOYER'S NAME AND ADDRESS The Hagadone Corporation 111 South First Street Coeur d'Alene, ID 83816	EMPLOYER'S ATTORNEY'S NAME AND ADDRESS Glenna M. Christensen MOFFATT THOMAS BARRETT ROCK & FIELDS PO Box 829 Boise, ID 83701-0829
I.C. NUMBER OF CURRENT CLAIM 99-016897	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTER'S) NAME AND ADDRESS Royal Indemnity Company a.k.a. Royal & Sunalliance PO Box 4057 Boise, ID 83711
DATE OF INJURY May 11, 1999	
NATURE AND CAUSE OF PHYSICAL IMPAIRMENT PRE-EXISTING CURRENT INJURY OR OCCUPATIONAL DISEASE May 5, 1996, industrial injury causing a hernia for which he underwent two surgeries, has been given permanent lifting restrictions, and a 10% impairment; July 24, 1997, motor vehicle accident resulting in left shoulder loss of function and cervial complaints.	
STATE WHY YOU BELIEVE THAT THE CLAIMANT IS TOTALLY AND PERMANENTLY DISABLED: The Industrial Commission in its decision of September 7, 2001, concluded claimant is totally and permanently disabled due to the effects of the industrial accidents, also acknowledging that the injuries caused by the motor vehicle accident contributed to his disability. He alleges back pain and other symptoms preclude employment.	
DATE May 20, 2002	SIGNATURE OF PARTY OR ATTORNEY 

PLEASE COMPLETE

CERTIFICATE OF SERVICE

I hereby certify that on the 20 day of May, 2002, I caused to be served a true and correct copy of the foregoing Complaint upon Manager, Industrial Special Indemnity Fund, Department of Administration, Statehouse Mail, Boise, Idaho 83720, and upon:

Thomas A. Mitchell
MITCHELL LAW FIRM
408 East Sherman - Suite 316
Coeur d'Alene, ID 83814

- ☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Bentley G. Stromberg
CLEMENTS BROWN & McNICHOLS
321 13th Street
PO Box 1510
Lewiston, ID 83501-1510

- ☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile


Glenna M. Christensen

YOU MUST ATTACH A COPY OF THE COMPLAINT AGAINST THE EMPLOYER TO THIS DOCUMENT

NOTICE! An Answer must be filed on Form I.C. 1003 within 21 days of service in order to avoid default.

10-000-124
COPY

WORKERS COMPENSATION COMPLAINT

CLAIMANT'S NAME AND ADDRESS Robert Stoddard 880 E. Pearl Hayden, ID 83835	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS John T. Mitchell 408 E. Sherman Ave., Suite 316 Coeur d'Alene, ID 83814	
EMPLOYER'S NAME AND ADDRESS The Hagadone Corporation 111 S. 1 st St. Coeur d'Alene, ID 83814	WORKER'S COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS Gates McDonald 3041 Pasadena Drive Boise, ID 83705	
CLAIMANT'S SSN [REDACTED]	CLAIMANT'S BIRTHDATE [REDACTED]	DATE OF INJURY OR MANIFESTATION OF OCCUPATIONAL DISEASE 5/11/99
STATE AND COUNTY IN WHICH INJURY OCCURRED Idaho, Kootenai County		WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE WEEKLY WAGE OF: \$480 (\$12/hr x 40/hrs/week)

RECEIVED

APR 17 2000

Moffet, Thomas, James [illegible]

DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED) Mowing on a steep slope, feet slipped out from under him, fell landed on buttocks very hard and slid down hill tumbled to left. Pain in low back and above right hip, pain in lower left groin, numbness in left leg from hip to knee.

NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE Acute fall aggravated the facet joint arthritis giving him the acute symptoms he has had since the May 11, 1999 fall. Injury superimposed on stenosis, degenerative disc disease and arthritis. Muscle tightness and back pain, groin pain, thigh pain and thigh weakness and numbness in left leg. Symptoms have worsened since insurance carrier discontinued all benefits including medical care, after the insurance panel examination.

WHAT WORKER'S COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME? Payment of medical expenses, and physical therapy expenses ordered by Dr. Shanks, TTD benefits during the period of recovery, PPI and PPD after stability is reached, attorney fees.

DATE ON WHICH NOTICE OF INJURY WAS GIVEN TO EMPLOYER? May 11, and 12, 1999	TO WHOM DID YOU GIVE NOTICE Mentioned symptoms to Mary Rex on 5/11/99, told Berni Dami, Secretary to Mr. Hagadone on 5/12/99.
---	--

HOW WAS NOTICE GIVEN: ☒ ORAL ☐ WRITTEN ☐ OTHER, PLEASE SPECIFY

ISSUE OR ISSUES INVOLVED Attorney fees for the unreasonable denial of payment of medical expenses for a May 25, 1999 CT Scan, for an August 9, 1999 MRI bill, for the discontinuation of all benefits on December 10, 1999 per the insurance panel evaluation of Dr. Warren Adams.

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? ☐ YES ☒ NO IF SO PLEASE STATE WHY.

PHYSICIANS WHO TREATED CLAIMANT (NAME ADDRESS)

Robert West, M.D.
920 Ironwood Dr. Suite A
Coeur d'Alene, ID 83814

Graeme French, M.D.
1200 W. Fairview
Colfax, WA 99111

William Shanks, M.D.
Northwest Orthopedic & Fracture Clinic
W. 105 Eighth Avenue, Suite 6080
Spokane, WA 99204

John K. Shuster, M.D.
Northwest Orthopedic & Fracture Clinic
W. 105 Eighth Avenue, Suite 6080
Spokane, WA 99204

WHAT MEDICAL COSTS HAVE YOU INCURRED TO DATE? Unknown

WHAT MEDICAL COSTS HAS YOUR EMPLOYER PAID, IF ANY \$ unknown, WHAT MEDICAL COSTS HAVE YOU PAID \$ unknown.

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE X YES NO

DATE: April 14, 2000 [Signature]
SIGNATURE OF CLAIMANT OR ATTORNEY

PLEASE ANSWER THE SET OF QUESTIONS IMMEDIATELY BELOW
ONLY IF CLAIM IS MADE FOR DEATH BENEFITS

NAME OF DECEASED	DATE OF DEATH	RELATION OF DECEASED TO CLAIMANT
WAS CLAIMANT DEPENDANT ON DECEASED		
<u> </u> YES <u> </u> NO	DID CLAIMANT LIVE WITH DECEASED AT THE TIME OF THE ACCIDENT	
<u> </u> YES <u> </u> NO		

CLAIMANT MUST COMPLETE, SIGN AND DATE THE FOLLOWING:

MEDICAL RELEASE FORM

I hereby authorize any defendant and defendant's legal counsel, at their sole expense, to examine, inspect, receive or take copies of any medical reports, records, x-rays or test results of hospitals, physicians or any other person, or to receive information from any person having examined me and their diagnosis, relative to my past, present and future physical and mental condition.

I also authorize and direct that a duplicate set of all documents or written records provided to said law firm, or any individual member thereof be also provided to my attorney JOHN T. MITCHELL. The defendant requesting my records shall bear the expense incurred in production of such duplicate set.

I further authorize that copies of this authorization may be used in lieu of the original. THIS AUTHORIZATION IS VALID ONLY FOR THE DURATION OF THE PENDING LITIGATION. It is further understood that all information obtained under this authorization shall be regarded as confidential and maintained as such.

Dated this 14th day of April, 2000.

[Signature]
Claimant's Signature

NOTICE! An Employer or Insurance Company served with a Complaint must file an Answer on Form I.C. 1003 with the Industrial Commission with 21 days of the date of service as specified on the certificate of mailing to avoid default. If no answer is filed, a Default Award may be entered!

Further information may be obtained from: Industrial Commission, Judicial Division, 317 Main Street, Boise, Idaho 83720-6000 (208)334-6000

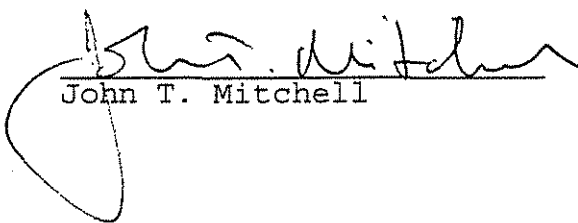
CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of April, 2000, that a true and correct copy of the foregoing was mailed by regular, postage pre-paid, addressed to:

The Hagadone Corporation
111 S. 1st St.
Coeur d'Alene, ID 83814

Gates McDonald
3041 Pasadena Drive
Boise, ID 83705

Courtesy copy to:
Glenna Christensen
P.O. Box 829
Boise, ID 83701


John T. Mitchell

Send Original To: Industrial Commission, Judicial Division, 317 Main Street, Boise, Idaho 83720-6000

ANSWER TO COMPLAINT

I.C. NO. 99-016897

INJURY DATE 5/11/99

CLAIMANT'S NAME AND ADDRESS (Not Applicable - Not in this Case) [ROBERT STODDARD] [880 EAST PEARL AVENUE] [HAYDEN, ID 83835]	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS (Not Applicable - Not in this Case) [THOMAS MITCHELL] [408 E. SHERMAN AVE., STE. 316] [COEUR D'ALENE, ID 83814-2778]
EMPLOYER'S NAME AND ADDRESS THE HAGADONE CORPORATION 111 S. FIRST STREET COEUR D'ALENE, ID 83816	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS ROYAL INDEMNITY CO. ADA ROYAL & SUNALLIANCE P. O. BOX 4057 BOISE, ID 83711
ATTORNEY REPRESENTING EMPLOYER OR EMPLOYER/SURETY (NAME AND ADDRESS) GLENN M. CHRISTENSEN MOFFATT THOMAS P. O. BOX 829 BOISE, ID 83701-0829	ATTORNEY REPRESENTING INDUSTRIAL SPECIAL INDEMNITY FUND (NAME AND ADDRESS) KENNETH L. MALLEA MALLEA LAW OFFICES P.O. BOX 857 MERIDIAN, IDAHO 83680

The Industrial Special Indemnity Fund responds to the Complaint against the ISIF by stating

IT IS: (check one)	
Admitted	Denied
	X
	X
	X
	X
	X
	X
	X
	X
	X

1. That the accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed.
2. That the employer/employee relationship existed.
3. That the parties were subject to the provisions of the Idaho Workers' Compensation Act.
4. That the condition for which benefits are claimed was caused partly _____ entirely _____ by an accident arising out of and in the course of Claimant's employment.
5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment.
6. That notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.
7. That, if an occupational disease is alleged, notice of such was given to the employer within five months after the employment had ceased in which it is claimed the disease was contracted.
8. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, Section 72-419: \$ _____
9. That the alleged employer was insured or permissibly self-insured under the Idaho Workers' Compensation Act.

10. What benefits, if any, do you concede are due Claimant? None.

(Continued from Page 1)

11. State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.

The following matters are in dispute: See Attached Affirmative Defenses.

The ISIF is denying liability because: See Attached Affirmative Defenses

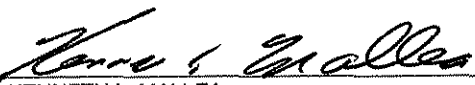
AFFIRMATIVE DEFENSES:

SEE ATTACHED

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. ☐ YES ☒ NO
☐ Under investigation

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? IF SO, PLEASE STATE.

Yes. Please see attached Affirmative Defenses

Amount of Compensation Paid to Date			Dated:	Signature of Defendant or Attorney
PPD	TTD	Medical	6/03/02	MALLEA LAW OFFICES
				 KENNETH L. MALLEA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of June, 2002, I caused to be served a true and correct copy of the foregoing Answer upon:

CLAIMANT'S ATTORNEY
N/A


EMPLOYER AND SURETY'S NAME
GLENN M. CHRISTENSEN
MOFFATT THOMAS
P. O. BOX 829
BOISE, ID 83701-0829

INDUSTRIAL SPECIAL INDEMNITY
FUND (If applicable)
NA

via: ☐ personal service of process
☒ regular U.S. Mail

via: ☐ personal service of process
☐ regular U.S. Mail

via: ☐ personal service of process
☐ regular U.S. Mail


Signature

Answer-Page 2 of 3

AFFIRMATIVE DEFENSES

- A. The Industrial Commission has entered a final decision in Industrial Commission case numbers 96-018310, 97-036904, 99-016897 which has fully adjudicated Employer's and Surety Royal Indemnity Company's liabilities to the claimant. The Surety Royal Indemnity Company has been found by the Industrial Commission to be fully liable to the claimant for all benefits. The Findings, Conclusions and Order of the Industrial Commission are binding upon Royal Indemnity Company and the Employer under the doctrines of Res Judicata and Collateral Estoppel. The Employer and Surety Royal Indemnity Company, in proceeding to litigate in Industrial Commission case numbers 96-018310, 97-036904, 99-016897, without joining the Industrial Special Indemnity Fund (hereinafter referred to as "ISIF") have waived any potential claim for apportionment which may have been available to the claimant or to the Surety during the pendency of the cases.
- B. The Employer and its Surety Royal Indemnity Company, by their conduct and omissions, are estopped to maintain this claim against the ISIF.
- C. In this proceeding, the Surety Royal Indemnity Company is attempting to impose liability upon the ISIF as to factual issues and legal issues litigated in proceedings wherein Royal Indemnity Company had elected not to join the ISIF. Any such attempt, and any proceedings conducted by the Industrial Commission seeking to impose liability upon the ISIF as to matters litigated in its absence constitute violations of due process of law and of equal protection of the law.
- D. Idaho Code § 72-332 is not a statute of indemnity or contribution and Royal Indemnity Company's attempt to impose liability against the ISIF without joining the ISIF in prior proceedings is in violation of Idaho Code § 72-332.
- E. All benefits to which the claimant is entitled under law have been fully adjudicated and liability therefore imposed as against the Employer and its Sureties, including Surety Royal Indemnity Company. Under Idaho Code § 72-332, there are no additional income benefits due, owing, or payable to the claimant. Idaho Code § 72-332 does not provide a basis for Surety Royal Indemnity Company to seek indemnity or contribution for liabilities finally determined by the Industrial Commission in prior legal proceedings wherein Surety Royal Indemnity Company had elected not to join the ISIF.
- F. The Industrial Commission in its Order on Reconsideration dated December 14, 2001, determined that the last accident (1999) caused claimant to suffer total and permanent disability and accordingly, that Royal Indemnity Company should be fully liable for total and permanent disability benefits. This determination by the Industrial Commission has not been modified or set aside. The final decision of the Industrial Commission has not been appealed to the Idaho Supreme Court. The Surety Royal Indemnity Company is fully liable for all benefits owed to claimant and has no claim for apportionment or contribution against the ISIF.

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT J. STODDARD,

Claimant,

v.

THE HAGADONE CORPORATION,

Employer,

and

ROYAL INDEMNITY COMPANY,

Surety,

and

STATE OF IDAHO, INDUSTRIAL
INDEMNITY FUND,

Defendants.

IC 1996-018310

1997-036904

1999-016897

**FINDINGS OF FACT,
CONCLUSION OF LAW,
AND RECOMMENDATION**

FILED

MAY 14 2007

INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Boise on July 18, 2006. As this matter did not directly involve any pecuniary interests of Claimant, he was not present either in person or by counsel. Eric S. Bailey of Boise represented Employer and its Surety, Royal Indemnity Company ("Royal"). Kenneth L. Mallea of Meridian represented the Idaho Special Indemnity Fund ("ISIF"). No witnesses testified at hearing but exhibits were admitted into evidence. The parties submitted post-hearing briefs and this matter came under advisement on March 30, 2007.

ISSUES

The issues to be decided as the result of the hearing are:

1. Whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine and, if so,
2. Whether ISIF is liable for a proportionate share of disability benefits.

CONTENTIONS OF THE PARTIES

Royal contends that Claimant was found to be an odd-lot worker in a prior decision and the Commission has allowed it to bring in ISIF in order to determine its responsibility to Royal in paying Claimant's total permanent disability benefits. Royal further contends that it should be responsible for 40% of those benefits and ISIF should be responsible for the remaining 60%.

ISIF contends that the Commission erred when it allowed Royal to join it after the first hearing and decision. In the event that the Commission adheres to its Declaratory Ruling allowing the joinder, ISIF nonetheless has no liability because no pre-existing condition(s) combined with Claimant's last industrial injury to cause total and permanent disability, both as a matter of law because the Commission has already decided that Claimant's last accident was the cause of his disability, and as a matter of fact because it was Claimant's last accident and the ensuing five years between hearings that created Claimant's current total disability. Alternatively, the record reveals that Claimant was already totally and permanently disabled before his last accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file.
2. Royal's Exhibits 1-12 admitted at the hearing.

3. ISIF's Exhibits 1-6 admitted at the hearing.

4. The post-hearing depositions of: William M. Shanks, M.D., Tiffany Jaeger-Nystil, and Dan Brownell, all taken by Royal on September 21, 2006, and Douglas M. Crum, CDMS, taken by Royal on October 20, 2006. The objections made during the taking of Mr. Brownell and Mr. Crum's depositions are overruled.

PROCEDURAL HISTORY

This Referee conducted the first hearing in this matter in Coeur d'Alene on March 14, 2001. At that hearing, John T. Mitchell of Coeur d'Alene represented Claimant. Bentley G. Stromberg of Lewiston represented Employer and its surety, General Insurance Company of America (General), for industrial accidents occurring on May 5, 1996 and October 10, 1997. Glenna M. Christensen of Boise represented Employer and its surety, Royal, for Claimant's last industrial accident occurring on May 11, 1999. The three claims were consolidated. ISIF was not joined and thus did not participate in the March 14, 2001, hearing. On September 7, 2001, the Commission issued its Findings of Fact and Conclusions of Law wherein they found Claimant to be totally and permanently disabled pursuant to the odd-lot doctrine. The Commission apportioned liability at 20% for General and 60% for Royal with the remaining 20% attributable to a non-industrial accident for which Claimant was compensated in an arbitration proceeding.

All parties timely moved for reconsideration/clarification of the apportionment aspect of the decision. On December 14, 2001, the Commission issued its Order Regarding Reconsideration wherein they found Royal 100% liable for Claimant's total and permanent disability.

On May 22, 2002, Royal filed a Complaint against ISIF seeking apportionment of liability pursuant to Idaho Code § 72-332. On October 11, 2002, ISIF requested a declaratory ruling seeking dismissal of Royal's Complaint on various grounds. On August 27, 2003, the Commission issued its Declaratory Ruling wherein Royal was permitted to proceed against ISIF. To the extent that ISIF objects to this proceeding based on arguments previously made in support of its petition for the declaratory ruling, those objections are overruled.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusion of law for review by the Commission.

FINDINGS OF FACT

1. At the time of the second hearing on July 18, 2006, Claimant was 70 years of age and resided in Coeur d'Alene. At all times relevant to this decision, Claimant was employed by the Hagadone Corporation as a caretaker/groundskeeper at Duane Hagadone's summer residence at Casco Bay on Lake Coeur d'Alene. He also owned a business performing topiary or shrubbery work as well as regular shrub trimming. During the course of his employment with Hagadone, Claimant suffered three industrial accidents and one non-industrial motor vehicle accident.

The Accidents

1st accident – groin:

2. On May 5, 1996, Claimant was unloading flowers from a boat when he felt something tear in his left groin area. He was subsequently diagnosed with a left inguinal hernia. He missed no time from work and was able to continue with his topiary business until after his first hernia surgery in February 1997. He returned to work but, at times, needed assistance from co-workers. He could no longer perform his topiary business due to discomfort. Claimant

underwent a second hernia repair in November 1997. He again missed no work as he scheduled the surgery during the time he was otherwise off work for the winter season. He was given permanent physical restrictions relating thereto of lifting no more than 30 pounds on an occasional basis and was assigned a 10% whole person PPI rating.

2nd accident – neck, left shoulder, low back:

3. On July 24, 1997, Claimant's vehicle was rear-ended while he was waiting at a stoplight. This accident was non-industrial. Claimant missed no work as the result of this accident. Claimant's cervical strain resolved but he continued to experience problems with his back and left shoulder. Claimant's treating physician for this injury assigned PPI at 20% of the whole person for his left shoulder condition and 10% for his lumbar condition. He also assigned the following restrictions: occasionally lift 10 pounds to shoulder height and 5 pounds frequently; 10 pounds above shoulder occasionally and 5 pounds frequently; and 25 pounds to the waist level occasionally and 15 pounds frequently. As Claimant is left-handed, he could no longer perform trimming and/or pruning activities.

3rd accident – low back:

4. On October 10, 1997, Claimant was moving some flowerpots into a storage shed when he felt something pop in his low back causing pain that has never gone away. Claimant testified at the first hearing that the pain was in a different area than the pain he experienced in his motor vehicle accident. Claimant was able to finish the 1997-1998 season with some accommodation. Claimant incurred no PPI as the result of this accident. *See, Findings, Conclusions, and Recommendation* filed September 7, 2001, Finding 19, pp. 13-14.

Final accident – low back:

5. On May 11, 1999, Claimant was mowing a lawn on a slope when his feet slipped out from underneath him and he fell straight down on his buttocks. Claimant was assigned a 10% whole person PPI for this accident with 5% pre-existing. He has not worked since.

DISCUSSION AND FURTHER FINDINGS

“Permanent disability” or “under a permanent disability” results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. “Evaluation (rating) of permanent disability” is an appraisal of the injured employee’s present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent non-medical factors provided in Idaho Code §72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease. Consideration should also be given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant; provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

There are two methods by which a claimant can demonstrate that he or she is totally and permanently disabled. The first method is by proving that his or her medical impairment together with the relevant nonmedical factors totals 100%. If a claimant has met this burden, then total and permanent disability has been established. The second method is by proving that, in the event he or she is something less than 100% disabled, he or she fits within the definition of an odd-lot worker. *Boley v. State Industrial Special Indemnity Fund*, 130 Idaho 278, 281, 939P.2d 854, 857 (1997). An odd-lot worker is one "so injured the he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Bybee v. State of Idaho, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996), citing *Arnold v. Splendid Bakery*, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). Such workers are not regularly employable "in any well-known branch of the labor market – absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984), citing *Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1963).

Once a claimant established a *prima facie* odd-lot case, the burden shifts to the employer to show there is:

An actual job within a reasonable distance from [claimant's] home which [claimant] is able to perform or for which [claimant] can be trained. In addition, the [employer] must show that [claimant] has a reasonable opportunity to be employed at that job. It is of no significance that there is a job [claimant] is capable of performing if he would in fact not be considered for the job due to his injuries, lack of education, lack of training, or other reasons.

Lyons v. Industrial Special Indemnity Fund, 98 Idaho 403, 407, 565 P.2d 1360, 1364 (1977).

6. William M. Shanks, M.D., vocational expert Douglas N. Crum, CDMS, and ICRD consultant Dan Brownell of the Coeur d'Alene field office testified by way of deposition after the July 19, 2006, hearing in this matter. All agree that Claimant was totally and permanently disabled as of the time of the first hearing and remains so. Neither party herein questions that Claimant is totally and permanently disabled, the present issue being ISIF's proportionate responsibility for payment of the benefits associated with that total disability.

7. The Referee finds that Claimant is totally and permanently disabled effective on or about July 19, 2006, the date of the second hearing.

Idaho Code § 72-332 provides:

Payment for second injuries from industrial special indemnity account, -- (1) If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by an injury or occupational disease arising out of and in the course of his [or her] employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury or occupational disease or by reason of the aggravation and acceleration of the pre-existing impairment suffers total and permanent disability, the employer and surety shall be liable for payment of compensation benefits only for the disability caused by the injury or occupational disease, including scheduled and unscheduled permanent disabilities, and the injured employee shall be compensated for the remainder of his income benefits out of the industrial special indemnity account.

(2) "Permanent physical impairment" is as defined in section 72-422, Idaho Code, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or occupational disease, of such seriousness to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become unemployed. This shall be interpreted subjectively as to the particular employee involved, however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing permanent physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

There are four elements that must be proven in order to establish liability of ISIF:

1. A pre-existing impairment;
2. The impairment was manifest;
3. The impairment was a subjective hindrance to employment; and,
4. The impairment combines with the industrial accident in causing total disability. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990).

8. ISIF presents two arguments in support of their position that they bear no responsibility for the payment of benefits in this case. The first is that they are not liable as a matter of law because the Commission, in their Order Regarding Reconsideration filed December 14, 2001, found: "Under the facts of this case, the Commission has determined that the last accident caused Claimant to suffer total and permanent disability. No other facts or circumstances have been presented to the Commission. Accordingly, the Commission finds that Royal should be fully liable for total and permanent disability benefits." Order Regarding Reconsideration, p. 4. And further, "Claimant is totally and permanently disabled pursuant to the odd-lot doctrine. Royal is liable for all such benefits." Order Regarding Reconsideration, p. 5.

Thus, ISIF argues, they are free from liability because there can be no “combining with” as a matter of law.

9. ISIF’s first argument is unpersuasive. At the time of the first hearing and the motions for reconsideration, ISIF was not a party so a “traditional” apportionment analysis under Idaho Code § 72-332, *Dumaw* and *Carey*, was not possible. In order to ensure that Claimant was afforded the full benefits awarded, the Commission on reconsideration found Royal to be responsible for the entire amount of those benefits. No appeal was taken. The use of the phrase “No other facts or circumstances have been presented to the Commission” implies that a different analysis of liability would have been utilized had ISIF been a party at that time. Further, the Commission’s Declaratory Ruling allowing the joinder of ISIF by Royal would have been rendered meaningless if the Commission meant to close the door on the “combining” requirement by holding that the last accident was the sole cause of Claimant’s permanent disability. As the Commission stated in the Declaratory Ruling, “The ruling [Reconsideration] was specifically framed in the context of the particular issues presented by the parties to the Commission.” Declaratory Ruling, p. 5, (emphasis added). Further, to illustrate the Commission’s intent to have ISIF’s liability, if any, to be decided on the merits is this passage: “Since no facts have been developed in this proceeding, the elements of ISIF liability under Idaho Code § 72-332 are more appropriate for an administrative hearing.” *Id.*, p. 11. The Referee finds that ISIF has failed to establish that Royal has failed to prove “combination” under the “but for” test of Idaho Code § 72-332 as a matter of law.

10. ISIF’s second, and more compelling, argument supporting their position of non-liability is that Royal has failed to prove a “combination” under the “but for” test under the facts of this case. A response to this argument requires an analysis of those facts under *Dumaw*, *Id.*

Pre-existing impairments:

11. Pre-existing permanent physical impairments have been found to be as follows pursuant to the Commission's Findings of Fact, Conclusions of Law, and Recommendation filed September 7, 2001:

May 5, 1996, hernia – 10%

July 24, 1997, MVA – 20% left shoulder; 5% low back

October 10, 1997, low back – 0%

May 11, 1999, low back – 5%

Subjective hindrances:

12. Dr. Shanks, Dan Brownell, and Doug Crum all testified that Claimant's pre-existing hernia condition, low back, and left shoulder problems were manifest and constituted hindrances to his employment and employability. Claimant himself so testified at the first hearing, thus the hindrances were both objective and subjective as to Claimant. He was forced to discontinue his topiary business due to his hernia and given lifting restrictions. Claimant's low back problems resulted in impairment and a caution from one physician that heavy lifting and prolonged bending may be too much for him. Mr. Brownell testified that Claimant went from a heavy work category prior to his hernia injury to medium prior to his last accident. Mr. Crum testified that Claimant had incurred disability of 75% to 80% before his last accident.

"Combines with" and "but for":

13. It is undisputed that Claimant was unemployable after his May 11, 1999, accident and injury. The inquiry thus becomes whether Claimant's pre-existing physical impairments combined with the last accident to render him totally and permanently disabled, or stated another way, whether Claimant would have been totally and permanently disabled but for his last

accident. Prior to the last accident, Claimant was able to work albeit with restrictions and accommodation. He was no longer able to do so after his last accident and Hagadone was unable to accommodate him further. Claimant made a legitimate attempt to locate work but failed. His pre-existing impairments total 35% of the whole person, which is significant. Mr. Brownell testified that pre-last accident, Claimant "most likely" could have found employment. The last accident resulted in significant standing, sitting, and walking restrictions and he could only tolerate a four-hour workday. It placed Claimant in the sedentary work category.

14. The relevant inquiry here is the status of Claimant's disability at the time of the second hearing wherein ISIF was "allowed" to participate. At that time, Claimant was 70 years of age and was still totally and permanently disabled. However, Mr. Brownell testified, and Mr. Crum did not disagree, that when considering only Claimant's age and lack of transferable skills to the sedentary labor market, Claimant was totally and permanently disabled. It was Claimant's last industrial accident, for which ISIF bears no responsibility, that landed him in the sedentary labor market. ISIF's argument that based on these facts, there has been no showing that any of Claimant's pre-existing impairments combined with his last industrial accident to render him totally and permanently disabled so as to invoke liability is persuasive.

15. The Referee finds that Claimant's current total and permanent disability is due to the lack of transferable skills to the sedentary labor market and his advanced age, and not the result of any combination of Claimant's pre-existing impairment and his last industrial accident.

CONCLUSION OF LAW

1. Royal has failed to prove ISIF's liability for any proportionate share of Claimant's total and permanent disability.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusion of Law, the Referee recommends that the Commission adopt such findings and conclusion as its own and issue an appropriate final order.

DATED this 2nd day of May, 2007.

INDUSTRIAL COMMISSION

Michael E. Powers
Michael E. Powers, Referee

ATTEST:

Gina Espinoza
Assistant Commission Secretary



CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of May, 2007, a true and correct copy of the **FINDINGS OF FACT, CONCLUSION OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

ERIC S BAILEY
PO BOX 1007
BOISE ID 83701

KENNETH L MALLEA
PO BOX 857
MERIDIAN ID 83680

Gina Espinoza

ge

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT J. STODDARD,

Claimant,

v.

THE HAGADONE CORPORATION,

Employer,

and

ROYAL INDEMNITY COMPANY,

Surety,

and

STATE OF IDAHO, INDUSTRIAL
INDEMNITY FUND,

Defendants.

IC 1996-018310
1997-036904
1999-016897

ORDER

FILED

MAY 14 2007

INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his proposed findings of fact and conclusion of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusion of law as its own. Further, the Commission reaffirms its previous decision in the Declaratory Ruling issued on August 27, 2003.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

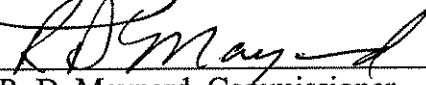
1. Royal has failed to prove ISIF's liability for any proportionate share of Claimant's total and permanent disability.

2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all issues adjudicated.

DATED this 14th day of May, 2007.


INDUSTRIAL COMMISSION

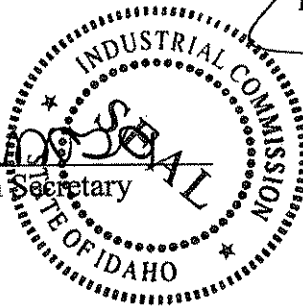

James F. Kile, Chairman


R. D. Maynard, Commissioner


Thomas E. Limbaugh, Commissioner

ATTEST:


Assistant Commission Secretary

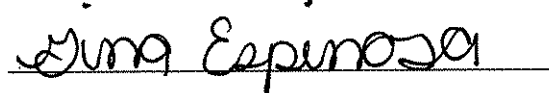


CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of May, 2007, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following persons:

ERIC S BAILEY
PO BOX 1007
BOISE ID 83701

KENNETH L MALLEA
PO BOX 857
MERIDIAN ID 83680



ge

ORIGINAL

ERIC S. BAILEY (ISB #4408)
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Facsimile: (208) 344-9670

Attorneys for Defendants/Appellants
The Hagadone Corp. and Royal Indemnity Co.

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INDUSTRIAL COMMISSION

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT J. STODDARD,	)	I.C. Nos.	1996-018310
	)		1997-036904
Claimant,	)		1999-016897
v.)		
)		
THE HAGADONE CORPORATION,)		
	)	NOTICE OF APPEAL	
Employer/Appellant,)		
and)		
)		
ROYAL INDEMNITY COMPANY,)		
)		
Surety/Appellant,)		
and)		
)		
STATE OF IDAHO, INDUSTRIAL)		
SPECIAL INDEMNITY FUND,)		
)		
Defendant/Respondent.)		

TO: THE ABOVE-NAMED RESPONDENT, State of Idaho, Industrial Special Indemnity
Fund, and its counsel of record:

1. The above-named Defendants/Appellants, The Hagadone Corporation, Employer, and Royal Indemnity Company, Surety, appeal against the above-named Defendant/Respondent, State of Idaho, Industrial Special Indemnity Fund, to the Idaho Supreme Court from the Industrial Commission Order entered in the above-entitled proceedings on the 14th day of May, 2007, Industrial Commission James F. Kile, Chairman, presiding.

2. That Defendants/Appellants have a right to appeal to the Idaho Supreme court, and the Order described in paragraph 1, above, is an appealable Order inasmuch as it is an Industrial Commission Order affirming the Referee's Findings of Fact, Conclusions of Law, pursuant to the provisions of I.C. § 72-718. Defendants/Appellants make this appeal pursuant to Rule 11(d) I.A.R., and I.C. §§ 72-718 and 724.

3. Defendants/Appellants assert that the Industrial Commission committed an error in its finding of no liability on the part of the Industrial Special Indemnity Fund. Specifically, the question is whether the Industrial Commission erred in its application of the "combined effects" test under I.C. § 72-332.

4. A reporter's transcript is requested in its entirety as to the hearing in this matter, which occurred on July 19, 2006. Additionally, Defendants/Appellants request the reporter's transcript to include all briefing associated with the Industrial Commission's Order dated May 14, 2007.

5. Defendants/Appellants request the following documents to be included in the Agency's Record in addition to those automatically included under Rule 28, I.A.R.:

(a) A transcript of the entire Industrial Commission hearing of July 19, 2006.

6. Undersigned certifies that:

- (a) The Clerk of the Industrial Commission has been paid the estimated fee of \$100.00 for preparation of the Clerk's Record;
- (b) The appellate filing fee in the amount of \$86.00 is being paid herewith;
- (c) Service has been made upon all parties required to be served pursuant to Rule 20, I.A.R.

DATED this 22 day of June, 2007.

BOWEN & BAILEY, L.L.P.

ERIC S. BAILEY - of the Firm
Attorneys for Defendants/Appellants
The Hagadone Corp./Royal Indemnity Co.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22 day of June, 2007, a true and correct copy of the foregoing document was served upon the following party(ies) in the method indicated:

KENNETH L MALLEA ESQ
78 SW 5TH AVE STE 1
MERIDIAN ID 83642
FAX: (208) 888-2789

- ☒ U.S. MAIL
- ☐ HAND DELIVERY
- ☐ FACSIMILE

Eric S. Bailey

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

RECEIVED
IDAHO SUPREME COURT
COURT OF APPEALS
2007 JUN 26 AM 9:10

ROBERT J. STODDARD,

Claimant,

v.

THE HAGADONE CORPORATION,
Employer, and ROYAL INDEMNITY
COMPANY, Surety,

Defendants/Appellants,

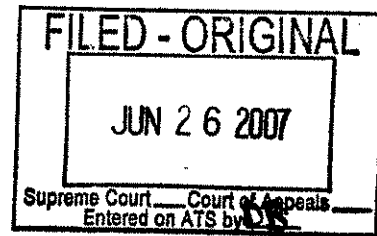
and

STATE OF IDAHO, INDUSTRIAL
SPECIAL INDEMNITY FUND,

Defendant/Respondent.

SUPREME COURT NO. 34335

CERTIFICATE OF APPEAL



Appeal From:

Industrial Commission, Chairman, James F. Kile,
presiding.

Case Number:

IC 1996-018310, 1997-036904, and 1999-016897.

Order Appealed from:

Findings of Fact, Conclusions of Law, and
Recommendation, filed May 14, 2007; and Order,
filed May 14, 2007.

Attorney for Appellant:

Eric S. Bailey
PO Box 1007
Boise, ID 83701

Attorney for Respondents:

Kenneth L. Mallea
PO Box 857
Meridian, ID 83680

Appealed By:

Defendants/Appellants

Appealed Against:

Defendant/Respondent

2007 JUN 28 A 10:42
RECEIVED
INDUSTRIAL COMMISSION

STODDARD CERTIFICATE OF APPEAL - 1

Notice of Appeal Filed:

June 25, 2007

Appellate Fee Paid:

\$86.00

Name of Reporter:

Dean Willis

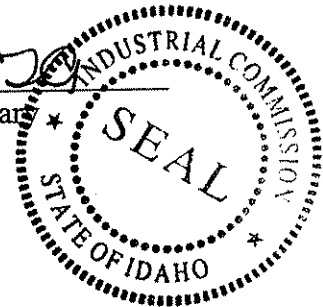
Transcript Requested:

Standard transcript has been requested. Transcript has been prepared and filed with the Commission.

Dated:

June 25, 2007


Assistant Commission Secretary



CERTIFICATION

I, Gina Espinosa, the undersigned Assistant Commission Secretary of the Industrial Commission of the State of Idaho, hereby CERTIFY that the foregoing is a true and correct photocopy of the Notice of Appeal, Findings of Fact, Conclusions of Law, and Recommendation, and Order, and the whole thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said Commission this 25th day of June, 2007.


Gina Espinosa
Assistant Commission Secretary



Kenneth L. Mallea, ISB No. 2397
MALLEA LAW OFFICES
78 SW 5th Avenue, Suite 1
Post Office Box 857
Meridian, Idaho 83680-0857
Telephone: (208) 888-2790
Facsimile: (208) 888-2789
E-Mail: klm@mallealaw.com

2001 JUL 10 P 1:55
RECEIVED
INDUSTRIAL COMMISSION

Attorney for Defendants/Cross-Appellants
State of Idaho Industrial Special Indemnity Fund

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT J. STODDARD,

Claimant,

v.

THE HAGADONE CORPORATION,

Employer/Appellant,

and

ROYAL INDEMNITY COMPANY,

Surety/Appellant,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL
INDEMNITY FUND,

Defendants/Cross-Appellants.

I.C. No. 99-016897

NOTICE OF CROSS-APPEAL

TO: THE ABOVE-NAMED EMPLOYER/APPELLANT THE HAGADONE CORPORATION, SURETY/APPELLANT ROYAL INDEMNITY COMPANY AND THEIR ATTORNEY OF RECORD:

NOTICE IS HEREBY GIVEN THAT:

1) The above-named Defendant/Respondent/Cross-Appellant State of Idaho, Industrial Special Indemnity Fund, appeal against the above-named Employer/Surety/Appellants/Cross-Respondents to the Idaho Supreme Court from the Industrial Commission's Findings of Fact, Conclusions of Law, Recommendation and corresponding Order, entered in the above-entitled action on the 14th day of May, 2007, James F. Kile, Industrial Commission Chairman, presiding, in which the Commission ordered that the Surety, Royal, had failed to prove ISIF's liability for any proportionate share of the Claimant's total and permanent disability, while at the same time rejecting ISIF's claim of non-liability due to the application of collateral-estoppel, waiver, etc.

2) That Defendant/Respondent/Cross-Appellant has a right to appeal to the Idaho Supreme Court, and that the Order described above in paragraph 1, is an appealable Order insomuch as it is an Industrial Commission Order affirming the Referee's Findings of Fact, Conclusions of Law, pursuant to the provisions of Idaho Code § 72-718. Defendant/Appellant makes this appeal pursuant to I.A.R. 11(d), (g), and Idaho Code § 72-718 and -724.

3) The issue on cross-appeal is, in the event a remand is ordered by the Idaho Supreme Court in this action, whether the Industrial Commission erred, as a matter of law, in not barring the Employer's/Surety's Complaint against ISIF due to the application

of Idaho Code § 72-718, collateral estoppel, waiver, estoppel and/or procedural due process.

4) Is additional reporter's transcript requested? Yes. Defendant/Respondent/Cross-Appellant requests a reporter's transcript in its entirety as to the hearing which occurred before Referee Michael E. Powers on March 14, 2001, in regards to Industrial Commission Case Nos. 96-018310 and 97-036904, which cases preceded and underlie the subject action. Defendant/Respondent/Cross-Appellant is exempt from paying the estimated fee for preparation of the reporter's transcript because the Defendant/Respondent/Cross-Appellant is a State agency.

5) Defendant/Respondent/Cross-Appellant requests the following documents to be included in the Agency's Record in addition to those automatically included under I.A.R. 28 and those designated by appellant in the initial notice of appeal:

(a) The petition, pleadings, motions and memoranda in support of or in opposition to any such motions which are contained in Industrial Commission Case Nos. 96-018310 and 97-036904 which cases preceded and underlie the subject action.

(b) Any final decisions, orders or awards issued in the cases identified in subsection (a).

(c) Any petition for rehearing or reconsideration, along with any briefing filed in support of or in opposition to such petition, issued in the cases identified in subsection (a).

6) I certify:

(a) That a copy of this Notice of Cross-Appeal and any requests for additional transcript have been served on the reporter.

(b) That Defendant/Respondent/Cross-Appellant is exempt from paying the estimated fee for preparation of the reporter's transcript because the Defendant/Respondent/Cross-Appellant is a State agency.

(c) That Defendant/Respondent/Cross-Appellant is exempt from paying the estimated fee for including any additional documents in the Agency's record because the Defendant/Respondent/Cross-Appellant is a State agency.

(d) That the Cross-Appellant is exempt from paying the Cross-Appellate filing fee because Cross-Appellant is a State Agency.

(e) That service has been made upon all parties required to be served pursuant to I.A.R. 20.

DATED this 10th day of July, 2007.

By Kenneth L. Mallea
Kenneth L. Mallea
Attorney for State of Idaho, Industrial
Special Indemnity Fund

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 10 day of July, 2007, I served a true and correct copy of the foregoing **NOTICE OF CROSS-APPEAL** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Eric S. Bailey
Bowen & Bailey, LLP
Jefferson Place, Suite 200
350 North Ninth Street
Boise, Idaho 83701-1007
Telephone: (208) 344-7200
Facsimile: (208) 344-9670
*Attorneys for The Hagadone Corp.
and Royal Indemnity Co.*

☒ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☐ Facsimile

M & M Court Reporting Service
816 E. Sherman Avenue, Suite 7
Coeur d'Alene, ID 83814


Kenneth L. Mallea

RECEIVED
IDAHO SUPREME COURT
COURT OF APPEALS

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

2007 JUL 12 AM 9:27

ROBERT J. STODDARD,

Claimant,

v.

THE HAGADONE CORPORATION,
Employer, and ROYAL INDEMNITY
COMPANY, Surety,

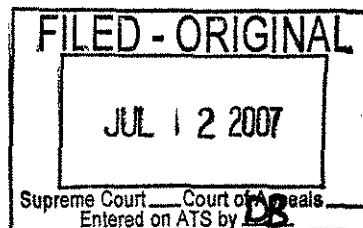
Defendants/Appellants/Cross-
Respondents,

and

STATE OF IDAHO, INDUSTRIAL
SPECIAL INDEMNITY FUND,

Defendant/Respondent/Cross-
Appellant.

SUPREME COURT NO. 34335
AMENDED
CERTIFICATE OF ~~APPEAL~~ APPEAL



Appeal From:

Industrial Commission, Chairman, James F. Kile,
presiding.

Case Number:

IC 1996-018310, 1997-036904, and 1999-016897

Order Appealed from:

Findings of Fact, Conclusions of Law, and
Recommendation, filed May 14, 2007; and Order,
filed May 14, 2007.

Attorney for Cross-Appellant:

Kenneth L. Mallea
PO Box 857
Meridian, ID 83680

Attorney for Cross-Respondents:

Eric S. Bailey
PO Box 1007
Boise, ID 83701

Appealed By:

Defendant/Respondent/Cross-Appellant

STODDARD CERTIFICATE OF CROSS-APPEAL - 1

Appealed Against:

Defendants/Appellants/Cross-Respondents

Notice of Appeal Filed:

July 10, 2007

Appellate Fee Paid:

Cross-Appellant is a State agency and exempt from fees.

Name of Reporter:

M & M Court Reporting Service, Inc.

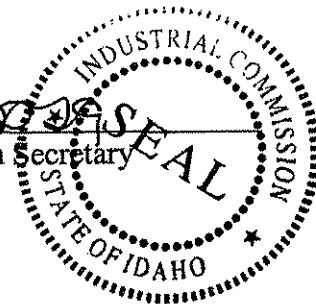
Transcript Requested:

Additional transcript has been requested. Transcript of hearing held 3/14/01 has been prepared and filed with the Commission.

Dated:

July 11, 2007

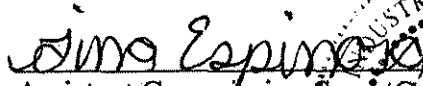
Jing Espinoza
Assistant Commission Secretary




CERTIFICATION

I, Gina Espinosa, the undersigned Assistant Commission Secretary of the Industrial Commission of the State of Idaho, hereby CERTIFY that the foregoing is a true and correct photocopy of the Notice of Cross-Appeal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said Commission this 11th day of July, 2007.


Assistant Commission Secretary



CERTIFICATION OF RECORD

I, Gina Espinosa, the undersigned Assistant Commission Secretary of the Industrial Commission, do hereby certify that the foregoing record contains true and correct copies of all pleadings, documents, and papers designated to be included in the Agency's Record Supreme Court No. 34335 on appeal by Rule 28(3) of the Idaho Appellate Rules and by the Notice of Appeal, pursuant to the provisions of Rule 28(b).

I further certify that all exhibits offered or admitted in this proceeding, if any, are correctly listed in the Certificate of Exhibits (i). Said exhibits will be lodged with the Supreme Court upon settlement of the Reporter's Transcript and Record herein.

DATED this 25th day of September, 2007.

Gina Espinosa
Assistant Commission Secretary



Kenneth L. Mallea, ISB No. 2397
MALLEA LAW OFFICES
78 SW 5th Avenue, Suite 1
Post Office Box 857
Meridian, Idaho 83680-0857
Telephone: (208) 888-2790
Facsimile: (208) 888-2789
E-Mail: klm@mallealaw.com

Attorney for Defendant State of Idaho
Industrial Special Indemnity Fund

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ROBERT J. STODDARD,

Claimant,

v.

THE HAGADONE CORPORATION,

Employer,

and

ROYAL INDEMNITY COMPANY,

Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL
INDEMNITY FUND,

Defendants.

I.C. No. 99-016897

**AMENDED NOTICE OF CROSS-
APPEAL**

Fee Category T:

~~\$86.00 (Supreme Court)~~

\$9.00

2001 AUG 22 A 10:39
RECEIVED
INDUSTRIAL COMMISSION

TO: THE ABOVE-NAMED CLAIMANT ROBERT J. STODDARD AND HIS
ATTORNEY OF RECORD:

NOTICE IS HEREBY GIVEN THAT:

1) The above-named Defendant/Respondent/Cross-Appellant State of Idaho, Industrial Special Indemnity Fund, appeal against the above-named Claimant/Appellant/Cross-Respondent to the Idaho Supreme Court from the Industrial Commission's Findings of Fact, Conclusions of Law, Recommendation and corresponding Order, entered in the above-entitled action on the 14th day of May, 2007, James F. Kile, Industrial Commission Chairman, presiding, in which the Commission ordered that the Surety, Royal, had failed to prove ISIF's liability for any proportionate share of the Claimant's total and permanent disability, while at the same time rejecting ISIF's claim of non-liability due to the application of collateral-estoppel, waiver, etc.

2) That Defendant/Respondent has a right to appeal to the Idaho Supreme Court, and that the Order described above in paragraph 1, is an appealable Order insomuch as it is an Industrial Commission Order affirming the Referee's Findings of Fact, Conclusions of Law, pursuant to the provisions of Idaho Code § 72-718. Defendant/Appellant makes this appeal pursuant to I.A.R. 11(d), (g), and Idaho Code § 72-718 and -724.

3) The issue on cross-appeal is, in the event a remand is ordered by the Idaho Supreme Court in this action, whether the Industrial Commission erred, as a matter of law, in not barring the Employer's/Surety's Complaint against ISIF due to the application of Idaho Code § 72-718, collateral estoppel, waiver, estoppel and/or procedural due process.

4) Is additional reporter's transcript requested? No.

5) Defendant/Respondent requests the following documents to be included in the Agency's Record in addition to those automatically included under I.A.R. 28 and those designated by appellant in the initial notice of appeal:


- (a) Deposition of Doug Crum, dated October 20, 2006.
- (b) Deposition of Tiffany Jaegen-NyStull, taken September 21, 2006.
- (c) Deposition of Dan Brownell, taken September 21, 2006.
- (d) Notice of Hearing, dated July 24, 2000.
- (e) Petition for Declaratory Ruling, filed October 11, 2002.
- (f) Memorandum in Support of Petition for Declaratory Ruling, filed October 12, 2002.
- (g) Defendants Employer/Surety's Memorandum in Opposition to Petition for Declaratory Ruling, filed October 30, 2002.
- (h) Memorandum in Response to Employer/Surety's Memorandum in Opposition to Petition for Declaratory Ruling, filed November 8, 2002.
- (i) Claimant's Position with Respect to Proceedings, filed November 8, 2002.
- (j) Declaratory Ruling (IC 15-000063), filed August 27, 2003.
- (k) Defendant ISIF's Post Hearing Brief, filed March 7, 2007.

6) I certify:

- (a) That a copy of this Amended Notice of Cross-Appeal and any requests for additional transcript have been served on the reporter.
- (b) That the Cross-Appellant is exempt from paying the Cross-Appellate filing fee because Cross-Appellant is a State Agency.

(c) That service has been made upon all parties required to be served pursuant to I.A.R. 20.

DATED this 21st day of August, 2007.

By 
Kenneth L. Mallea
Attorney for State of Idaho, Industrial
Special Indemnity Fund

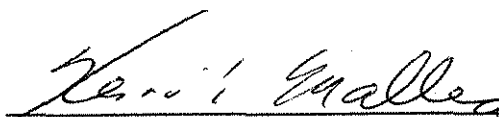
CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21st day of August, 2007, I served a true and correct copy of the foregoing **AMENDED NOTICE OF CROSS-APPEAL** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Eric S. Bailey
Bowen & Bailey, LLP
Jefferson Place, Suite 200
350 North Ninth Street
Boise, Idaho 83701-1007
Telephone: (208) 344-7200
Facsimile: (208) 344-9670
*Attorneys for The Hagadone Corp.
and Royal Indemnity Co.*

☒ U.S. Mail, postage prepaid
☐ Hand-Delivered
☐ Overnight Mail
☐ Facsimile

M & M Court Reporting Service
816 E. Sherman Avenue, Suite 7
Coeur d'Alene, ID 83814


Kenneth L. Mallea

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

ROBERT J. STODDARD,

Claimant,

v.

THE HAGADONE CORPORATION,
Employer, and ROYAL INDEMNITY
COMPANY, Surety,

Defendants/Appellants/Cross-
Respondents,

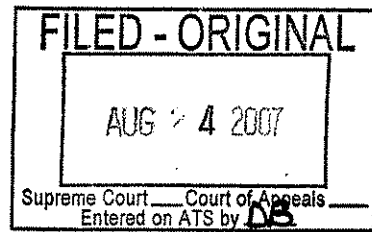
and

STATE OF IDAHO, INDUSTRIAL
SPECIAL INDEMNITY FUND,

Defendant/Respondent/Cross-
Appellant.

SUPREME COURT NO. 34335

AMENDED
CERTIFICATE OF APPEAL



RECEIVED
IDAHO SUPREME COURT
COURT OF APPEALS
2007 AUG 24 AM 9:51

Appeal From:

Industrial Commission, Chairman, James F. Kile,
presiding.

Case Number:

IC 1996-018310, 1997-036904, and 1999-016897

Order Appealed from:

Findings of Fact, Conclusions of Law, and
Recommendation, filed May 14, 2007; and Order,
filed May 14, 2007.

Attorney for Cross-Appellant:

Kenneth L. Mallea
PO Box 857
Meridian, ID 83680

Attorney for Cross-Respondents:

Eric S. Bailey
PO Box 1007
Boise, ID 83701

Appealed By:

Defendant/Respondent/Cross-Appellant

STODDARD AMENDED CERTIFICATE OF APPEAL - 1

Appealed Against: Defendants/Appellants/Cross-Respondents

Notice of Appeal Filed: July 10, 2007

Amended Notice of Cross-Appeal Filed: August 22, 2007

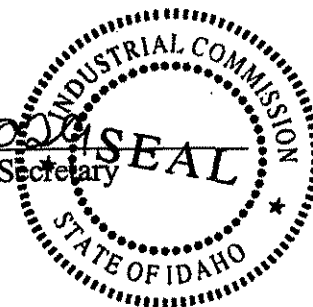
Appellate Fee Paid: Cross-Appellant is a State agency and exempt from fees.

Name of Reporter: M & M Court Reporting Service, Inc.

Transcript Requested: Additional transcript has been requested. Transcript of hearing held 3/14/01 has been prepared and filed with the Commission.

Dated: August 23, 2007

Lina Espinoza
Assistant Commission Secretary



CERTIFICATION

I, Gina Espinosa, the undersigned Assistant Commission Secretary of the Industrial Commission of the State of Idaho, hereby CERTIFY that the foregoing is a true and correct photocopy of the Amended Notice of Cross-Appeal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said Commission this 23rd day of August, 2007.


Assistant Commission Secretary



BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

ROBERT J. STODDARD,

Claimant,

v.

THE HAGADONE CORPORATION,
Employer, and ROYAL INDEMNITY
COMPANY, Surety,

Defendants/Appellants/Cross-
Respondents,

and

STATE OF IDAHO, INDUSTRIAL
SPECIAL INDEMNITY FUND,

Defendant/Respondent/Cross-
Appellant.

SUPREME COURT NO. 34335

NOTICE OF COMPLETION

TO: STEPHEN W. KENYON, Clerk of the Courts; and
Eric S. Bailey, for the Defendants/Appellants/Cross-Respondents; and
Kenneth L. Mallea, for the Defendant/Respondent/Cross-Appellant.

YOU ARE HEREBY NOTIFIED that the Agency's Record was completed on this date and,
pursuant to Rule 24(a) and Rule 27(a), Idaho Appellate Rules, copies of the same have been served
by regular U.S. mail upon each of the following:

ERIC S. BAILEY
PO BOX 1007
BOISE, ID 83701

KENNETH L. MALLEA
PO BOX 857
MERIDIAN, ID 83680

NOTICE OF COMPLETION (Stoddard S.C. #34335) - 1

YOU ARE FURTHER NOTIFIED that pursuant to Rule 29(a), Idaho Appellate Rules, all parties have twenty-eight days from this date in which to file objections to the Record, including requests for corrections, additions or deletions. In the event no objections to the Agency's Record are filed within the twenty-eight day period, the Transcript and Record shall be deemed settled.

DATED this 25th day of September, 2007.


Assistant Commission Secretary

